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Supreme Court, U.S.
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In The

Supreme Court of the United States

NILSON HERNEY VALENCIA-RIASCOS,

Petitioner,

vs.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether 8 U.S.C. § 1252(d)(1), pertaining to the judicial review of final orders of removal, sets forth a jurisdictional issue exhaustion requirement.

Whether, if 8 U.S.C. § 1252(d) indeed sets forth a jurisdictional issue exhaustion requirement, the application of the requirement to the Petitioner's deportation appeal may contravene the fundamental fairness guarantee of the Fifth Amendment.

RULE 29.6 STATEMENT

The Petitioner is Nilson Herney Valencia-Riascos.

The Respondent is Eric H. Holder, Jr., the United States Attorney General.

No corporations, partnerships, or similar entities are involved.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
RULE 29.6 STATEMENT	ii
PETITION FOR CERTIORARI	1
OPINIONS AND ORDERS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF REASONS FOR ALLOWING THE WRIT	5
REASONS FOR ALLOWING THE WRIT	9
I. BECAUSE THE HOLDING BY THE COURT OF APPEALS THAT THE ISSUE EXHAUSTION BAR AT 8 U.S.C. § 1252(d)(1) IS JURISDICTIONAL CONFLICTS BOTH WITH *SIMS V. APFEL*, 530 U.S. 103 (2000) AND WITH THE JURISPRUDENCE OF THE SECOND CIRCUIT, THIS COURT SHOULD GRANT CERTIORARI SO AS TO CONFIRM THAT THE IMMIGRATION ISSUE EXHAUSTION BAR IS NOT JURISDICTIONAL	9
A. THE DECISION BELOW CONFLICTS WITH *SIMS V. APFEL*	9
B. THOUGH A CIRCUIT SPLIT EXISTS ABOUT WHETHER AN IMMIGRANT'S DUTY TO EXHAUST ISSUES IS JURISDICTIONAL, THE SECOND CIRCUIT HAS ADOPTED THE SOUNDER, NON-JURISDICTIONAL APPROACH	16

TABLE OF CONTENTS – Continued

Page

1. SURVEY OF THE NATIONAL LAW CONSTRUING THE IMMIGRATION APPEAL ISSUE EXHAUSTION REQUIREMENT 17

2. FOUR ADDITIONAL CONSIDERATIONS AGAINST THE NINTH CIRCUIT'S POSITION 20

C. ASSUMING THE COURT DETERMINES THAT THE COURTS OF APPEALS CAN WAIVE THE ISSUE EXHAUSTION REQUIREMENT, STRONG CONSIDERATIONS SUPPORT DOING SO WITH RESPECT TO THE PETITIONER'S PARTICULAR SOCIAL GROUP CLAIM 34

II. AS APPLIED TO THE PETITIONER, A JURISDICTIONAL ISSUE EXHAUSTION REQUIREMENT WOULD VIOLATE THE FIFTH AMENDMENT GUARANTEE OF FUNDAMENTALLY FAIR REMOVAL PROCEEDINGS 35

CONCLUSION 37

APPENDIX

APPENDIX A: Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. 1

APPENDIX B: Opinion of the Board of Immigration Appeals ..... App. 3

APPENDIX C: Opinion of the Immigration Judge ..... App. 4

APPENDIX D: Amended Order of the Immigration Judge ..... App. 16

TABLE OF CONTENTS – Continued

Page

APPENDIX E: Original Order of the Immigration Judge ..... App. 19

APPENDIX F: Order of the United States Court of Appeals for the Ninth Circuit denying rehearing and denying rehearing en banc..... App. 22

TABLE OF AUTHORITIES

Page

CASES

Abebe v. Gonzales, 432 F.3d 1037 (9th Cir. 2005) (en banc) 10

Aden v. Holder, 589 F.3d 1040 (2009) 30, 31

Aguilar v. U.S. Immigration and Customs Enforcement, 510 F.3d 1 (1st Cir. 2007) 24

Arbaugh v. Y&H Corp., 546 U.S. 500 (2006) ..... *passim*

Barron v. Ashcroft, 358 F.3d 674 (9th Cir. 2004) 5, 6, 7, 9, 10

Bowles v. Russell, 551 U.S. 205 (2007) 10, 19, 20

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940) 29

Citizens United v. Federal Election Commission, 558 U.S. ___, 130 S.Ct. 876 (2010) 30

De La Cruz Galvan v. Mukasey, 2010 WL 2232664 (2010) (not selected for publication) 33

Da Silva v. Kinsho Intern. Corp., 229 F.3d 358 (2d Cir. 2000) 28

Dhaliwal v. Holder, 349 Fed.Appx. 147 (2009) (not selected for publication) 33

Etchu-Njang v. Gonzales, 403 F.3d 577 (8th Cir. 2005) 17, 18, 21, 25

Fajardo-Alvarez v. Holder, 349 Fed.Appx. 198 (2009) (not selected for publication) 33

Farhoud v. I.N.S., 122 F.3d 794 (9th Cir. 1997) 10

TABLE OF AUTHORITIES – Continued

Page

Fernandez-Bernal v. Attorney General of U.S., 257 F.3d 1304 (11th Cir. 2001) 6, 18

Fong Yue Ting v. United States, 149 U.S. 698 (1893) 8

FPC v. Colorado Interstate Gas Co., 348 U.S. 492 (1955) 14

Gamboa Najera v. Holder, 316 Fed.Appx. 693 (2009) (not selected for publication) 34

Gasparyan v. Holder, 339 Fed.Appx. 797 (2009) (not selected for publication) 33

Grullon v. Mukasey, 509 F.3d 107 (2d Cir. 2007), *certiorari denied*, 129 S.Ct. 43 (2008) 12, 19

Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995) 32

Hernandez v. Holder, 2010 WL 4683903 (Nov. 21, 2010) (not selected for publication) 33

Hill v. McDonough, 547 U.S. 573 (2006) 23

I.N.S. v. St. Cyr, 533 U.S. 289 (2001) 32, 36

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 29

Jama v. Immigration and Customs Enforcement, 543 U.S. 335 (2005) 26

Jones v. Bock, 549 U.S. 199 (2007) 23

Koons Pontiac Buick GMC, Inc. v. Nigh, 543 U.S. 50 (2004) 22

TABLE OF AUTHORITIES – Continued

Page

Korsunskiy v. Gonzales, 461 F.3d 847 (7th Cir. 2006) 6, 18

Kucana v. Holder, 558 U.S. ___, 130 S.Ct. 827 (2010) 14, 15, 32, 37

Laing v. Ashcroft, 370 F.3d 994 (9th Cir. 2004) 34

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 63 (1993) 23

Lebron v. National Passenger Railroad Co., 513 U.S. 374 (1995) 30

Lin v. Attorney General of U.S., 543 F.3d 114 (3d Cir. 2008) 5, 17

Lopez-Navarrete v. Holder, 2010 WL 4851324 (Nov. 30, 2010) (not selected for publication) 33

Mambwe v. Holder, 572 F.3d 540 (8th Cir. 2009) 6, 18

Marine Mammal Conservancy, Inc. v. Department of Agriculture, 134 F.3d 409 (C.A.D.C. 1998) 14

Marrero Pichardo v. Ashcroft, 374 F.3d 46 (2d Cir. 2004)) 19

Massachusetts v. E.P.A., 549 U.S. 497 (2007) 24

Massis v. Mukasey, 549 F.3d 631 (4th Cir. 2008), *certiorari denied sub nom., Massis v. Holder*, 130 S.Ct. 736 (2009) 6, 18, 19

Mathews v. Eldridge, 424 U.S. 319 (1976) 13

McCarthy v. Madigan, 503 U.S. 140 (1992) 11, 15, 35

TABLE OF AUTHORITIES – Continued

Page

McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991) 32

Michel v. Holder, 358 Fed.Appx. 980 (2009) (not selected for publication) 33

Morales-Alegria v. Gonzales, 449 F.3d 1051 (9th Cir. 2006) 10

Omari v. Holder, 562 F.3d 314 (5th Cir. 2009) 6, 19

Orellana-Martinez v. Holder, 2010 WL 4721196 (Nov. 22, 2010) (not selected for publication) 33

Owens v. Republic of Sudan, 531 F.3d 884 (D.C. Cir. 2008) 11

Padilla v. Kentucky, 559 U.S. ___, 130 S.Ct. 1473 (2010) 8, 36

Pjetri v. Gonzales, 468 F.3d 478 (7th Cir. 2006) 6, 18

Portillo-Mendez v. Holder, 2010 WL 4780849 (Nov. 24, 2010) (not selected for publication) 33

Ramani v. Ashcroft, 378 F.3d 554 (6th Cir. 2004) 6, 18

Rendon v. Mukasey, 520 F.3d 967 (9th Cir. 2008) 10, 31

Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993) 32

Rodriguez-Vera v. Holder, 348 Fed.Appx. 280 (2009) (not selected for publication) 33

Romero-Reyes v. Holder, 362 Fed.Appx. 568 (8th Cir. 2010) (not selected for publication) 6, 18

TABLE OF AUTHORITIES – Continued

Page

Sims v. Apfel, 530 U.S. 103 (2000) ..... *passim*

Sousa v. I.N.S., 226 F.3d 28 (1st Cir. 2000) 5, 17

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 27

Stoll v. Gottlieb, 305 U.S. 165 (1938) 29

Sun v. Ashcroft, 370 F.3d 932 (9th Cir. 2004) 31

Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002) 24

Tionda v. Holder, 2010 WL 4746148 (Nov. 23, 2010) (not selected for publication) 33

United States v. Jacobo Castillo, 496 F.3d 947 (9th Cir. 2007) (en banc) 11, 20

United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952) 14, 26

United States v. Pallares-Galan, 359 F.3d 1088 (9th Cir. 2004) 31

United States v. Williams, 504 U.S. 36 (1994) 30

Vaden v. Discover Bank, 129 S.Ct. 1262 (2009) 23

Vasquez-Aguirre v. Holder, 362 Fed.Appx. 736 (2010) (not selected for publication) 33

Verizon Communications Inc. v. F.C.C., 535 U.S. 467 (2002) 36

Washington Assn. for Television and Children v. FCC, 712 F.2d 677 (C.A.D.C. 1983) 14

Whitfield v. United States, 543 U.S. 209 (2005) 22, 25

TABLE OF AUTHORITIES – Continued

Page

Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645 (1982) 14, 25

Yung Ying Shi v. Holder, 337 Fed.Appx. 666 (2009) (not selected for publication) 34

Zara v. Ashcroft, 383 F.3d 927 (9th Cir. 2004) 10

Zhang v. Ashcroft, 388 F.3d 713 (9th Cir. 2004) 30

Zhong v. U.S. Department of Justice, 480 F.3d 104 (2d Cir. 2007) (denying consideration) 16, 19

Zhong v. U.S. Department of Justice, 489 F.3d 126 (2d Cir. 2007) ..... *passim*

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 27

STATUTES

5 U.S.C. § 704 24

8 U.S.C. § 1105a 17, 22

8 U.S.C. § 1152 22

8 U.S.C. § 1227 2

8 U.S.C. § 1229a 2

8 U.S.C. § 1252 ..... *passim*

9 U.S.C. § 203 23

9 U.S.C. § 205 24

15 U.S.C. § 77i 24

15 U.S.C. § 78y 24

18 U.S.C. § 371 24

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 1956 .....22, 24, 25

21 U.S.C. § 846 .....24, 25

28 U.S.C. § 1254 2

28 U.S.C. § 1331 .....27, 28

28 U.S.C. § 1332 27

28 U.S.C. § 2107 .....19, 20

28 U.S.C. § 2241 37

28 U.S.C. § 2349 24

29 U.S.C. § 160 .....14, 24

29 U.S.C. § 210 24

42 U.S.C. § 1997e.....23

42 U.S.C. § 2000e-5 .....27, 28

42 U.S.C. § 7521 24

47 U.S.C. § 405 14

Administrative Procedure Act.....24

Federal Arbitration Act.....23

Hobbs Administrative Orders Review Act. 24

Illegal Immigration Reform and Immigrant Responsibility Act, 110 Stat. 3009-546 22

Prison Litigation Reform Act 23

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V ..... i, 2, 35, 36

U.S. CONST. art. I, § 1 11

U.S. CONST. art. I, § 8 11

U.S. CONST. art. III, § 2, cl. 1-2 ..... 11, 36

RULES AND REGULATIONS

8 C.F.R. § 1003.3 15

8 C.F.R. § 1003.1 12

OTHER AUTHORITIES

H.R. Conf. Rep. 104-828 22

United Nations Convention Against Torture 30, 36

PETITION FOR CERTIORARI

The Petitioner, Nilson Herney Valencia-Riascos, prays that a writ of certiorari be granted to review and reverse the judgment entered below by the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The Ninth Circuit opinion denying relief to the Petitioner is unreported. It is available at 383 Fed.Appx. 662, and at 2010 WL 2354147. *See* App. to Pet. for Cert., at pp. 1-2. The decision was issued on June 14, 2010.

On September 9, 2010, the court of appeals denied the Petitioner's timely joint motion for rehearing and for rehearing en banc. *See id.*, at p. 22.

Judge Canby had recommended that rehearing en banc be granted. *See id.*

The unreported summary affirmance by the Board of Immigration Appeals is included in the App. to Pet. for Cert., at p. 3.

The unreported opinion of the immigration judge is included in the App. to Pet. for Cert., at pp. 4-15.

STATEMENT OF JURISDICTION

The Court possesses jurisdiction over this appeal pursuant to 28 U.S.C. § 1254(1), since this appeal concerns a civil removal proceeding initiated before the U.S. Department of Justice, Executive Office for Immigration Review, pursuant to 8 U.S.C. §§ 1227, 1229a, and since the result of the proceeding was subsequently reviewed by the United States Court of Appeals for the Ninth Circuit pursuant to 8 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. § 1252(d), treating certain preconditions to the judicial review over a final order of removal, provides:

> (d) Review of final orders
>
> A court may review a final order of removal only if –
>
> (1) the alien has exhausted all administrative remedies available to the alien as of right, and
>
> (2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

STATEMENT OF THE CASE

This is a deportation appeal. Petitioner fears persecution at the hands of the Revolutionary Armed Forces of Colombia (FARC) guerilla group in his native Colombia. The factual events forming the bases of the Petitioner's claims to protection from removal are described by the immigration judge in her opinion denying relief. *See* App. to Pet. for Cert., at pp. 4-8.

The immigration judge found that the Petitioner had testified credibly and that he had "made a good faith effort to corroborate his claim." *See* App. to Pet.

for Cert., at pp. 9-10; *id.*, at p. 9 ("The Government concedes that Respondent testified credibly in these proceedings, and the Court so finds[.] Respondent testified consistently in what appeared to the Court to be an entirely straight forward manner."). Nevertheless, the immigration judge found that the Petitioner had failed to demonstrate a fear of future persecution on account of a political opinion. *See id.*, at pp. 10-11. Addressing the matter *sua sponte*, the immigration judge also found that the Petitioner had failed to make out a case of particular social group persecution (an issue which the Petitioner had not explicitly raised before the immigration judge). *See id.*, at pp. 11-12.

Upon administrative appeal, one member of the Board of Immigration Appeals summarily affirmed the decision by the immigration judge. App. to Pet. for Cert., at p. 3.

During the course of his administrative removal proceedings, the Petitioner was pro se and detained. He procured the assistance of this writer after having initiated an appeal to the Ninth Circuit on his own. *Accord* App. to Pet. for Cert., at pp. 1-2; 3 (BIA order disposing of the Petitioner's administrative appeal, and indicating that the Petitioner appeared pro se before the Board).

In briefing before the court of appeals, and aided by this writer, Petitioner framed his claim for relief from removal as arising from particular social group persecution. *Accord id.*, at pp. 1-2.

The court of appeals dismissed the Petitioner's judicial appeal for want of subject matter jurisdiction. *See id.* The court held that the Petitioner could not air a particular social group issue before the court because the issue had not been raised before the BIA. *See id.*

The court denied a timely motion for panel rehearing and for rehearing en banc. *See id.*, at p. 22. Though no judge requested a poll on the motion for rehearing en banc, Judge Canby had recommended that the motion for rehearing en banc be granted. *See id.*

SUMMARY OF REASONS FOR ALLOWING THE WRIT

This deportation appeal calls for the resolution of an important question implicating the subject matter jurisdiction of the federal courts. In resolving a circuit split which has produced conflicting interpretations of 8 U.S.C. § 1252(d)(1), this Court is asked to reaffirm the principle that a simple administrative remedy exhaustion requirement must not be conflated with (and judicially enlarged into comprising) a jurisdictional, administrative issue exhaustion requirement. Along with practically all federal appeals courts except the Second Circuit, the Ninth Circuit erroneously conflates the two requirements. *Cf. Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. 2004); *Sousa v. I.N.S.*, 226 F.3d 28, 31 (1st Cir. 2000); *Lin v. Attorney General of U.S.*, 543 F.3d 114, 120 n.6 (3d Cir. 2008);

Massis v. Mukasey, 549 F.3d 631 (4th Cir. 2008), *certiorari denied sub nom.*, *Massis v. Holder*, 130 S.Ct. 736 (2009); *Omari v. Holder*, 562 F.3d 314, 324-25 (5th Cir. 2009); *Ramani v. Ashcroft*, 378 F.3d 554, 558-60 (6th Cir. 2004); *Fernandez-Bernal v. Attorney General of U.S.*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001); *but see Zhong v. U.S. Department of Justice*, 489 F.3d 126 (2d Cir. 2007) (Calabresi, J., concurring in the denial of rehearing en banc).[1]

Citing its published precedents, the Ninth Circuit dismissed the Petitioner's deportation appeal – *i.e.*, his particular social group argument – for want of subject matter jurisdiction. The court of appeals found it dispositive that "Valencia-Riascos' *pro se* Notice of Appeal to the BIA, however, even construed liberally, *see, e.g.*, *Barron v. Ashcroft*, 358 F.3d 674, 676 n.4 (9th Cir. 2004), provided the agency no notice that he was appealing the IJ's particular social group finding." App. to Pet for Cert., at p. 2; *see also Barron*, 358 F.3d, at 677 ("The plain language of § 1252(d)(1), therefore, specifically mandates that the exhaustion of administrative remedies is a prerequisite to our jurisdiction.").

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[1] The Third and Seventh Circuits have acknowledged the controversy in this area, though their past precedents hew towards the Ninth Circuit's approach. *Cf. Romero-Reyes v. Holder*, 362 Fed.Appx. 568, 570 (8th Cir. 2010) (not selected for publication) (citing *Mambwe v. Holder*, 572 F.3d 540, 550 (8th Cir. 2009)). *Cf. Korsunskiy v. Gonzales*, 461 F.3d 847 (7th Cir. 2006), *with Pjetri v. Gonzales*, 468 F.3d 478, 481 (7th Cir. 2006).

Yet, contrary to *Barron*, 8 U.S.C. § 1252(d)(1) solely mandates the exhaustion of remedies; the plain meaning of the statute does not command issue exhaustion. The statute provides that, "A court may review a final order of removal only if the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1). The statute does not refer to issues. As such, the Ninth Circuit's imputation of an issue exhaustion requirement into 8 U.S.C. § 1252(d)(1) is irreconcilable with *Sims v. Apfel*, 530 U.S. 103 (2000), a Social Security Act decision which underlines the fundamental distinction between the issue exhaustion and remedy exhaustion doctrines.

Furthermore, the Ninth Circuit's imputation of an issue exhaustion requirement into 8 U.S.C. § 1252(d)(1) is unwarranted because: (1) Congress should not be presumed to have implicitly incorporated an issue exhaustion requirement into 8 U.S.C. § 1252(d)(1); (2) this Court has taught that the lower courts should avoid "'drive-by jurisdictional rulings'" which confuse jurisdictional questions with other forms of inquiry, *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (citation omitted); (3) a jurisdictional issue exhaustion requirement will impose incalculable investigatory demands upon the courts of appeals; and (4) a jurisdictional issue exhaustion requirement will flout this Court's canon preferring statutory interpretations which preserve the right to judicial review over final agency actions.

The Second Circuit is correct about 8 U.S.C. § 1252(d)(1), and the other circuits – including the

Ninth – are incorrect. Any issue exhaustion bar is not jurisdictional. Interpreting any bar as jurisdictional perpetuates an antiquated conception of subject matter jurisdiction. *Cf. Arbaugh*, 546 U.S., at 511.

Thus, the Court should grant certiorari in order to fix definitively the jurisdictional scope of 8 U.S.C. § 1252(d)(1). Further percolation is of no benefit, since almost all courts have already weighed in upon the jurisdictional question.

This Court's intervention is doubly important because of the large volume of removal appeals, and because of the drastic consequences of deportations. *See Padilla v. Kentucky*, 559 U.S. ___, 130 S.Ct. 1473, at 1481 (2010) ("We have long recognized that deportation is a particularly severe [albeit non-criminal] 'penalty'. . . .") (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

Notwithstanding all of the foregoing, if the Court holds that 8 U.S.C. § 1252(d)(1) furnishes a jurisdictional issue exhaustion requirement, the Court is urged to grant certiorari in order to remand the appeal to the Ninth Circuit for a determination, in the first instance, about whether the application of the issue requirement to the Petitioner is fundamentally unfair, and therefore contrary to the Fifth Amendment.

REASONS FOR ALLOWING THE WRIT

I. Because The Holding By The Court Of Appeals That The Issue Exhaustion Bar At 8 U.S.C. § 1252(d)(1) Is Jurisdictional Conflicts Both With *Sims v. Apfel*, 530 U.S. 103 (2000) And With The Jurisprudence Of The Second Circuit, This Court Should Grant Certiorari So As To Confirm That The Immigration Issue Exhaustion Bar Is Not Jurisdictional.

A. The decision below conflicts with *Sims v. Apfel*

The Court ought to grant certiorari so as to reject the Ninth Circuit's holding that – because the Petitioner did not specifically raise his particular social group-based asylum claim before the Board of Immigration Appeals – he has forfeited the right to advance the claim in his judicial appeal. The Court should hold that 8 U.S.C. § 1252(d)(1) does not require issue exhaustion as a jurisdictional matter; that, in deportation appeals, issue exhaustion is a regulatory and a judicial creation, not statutory; and that, as such, the courts of appeals possess the inherent authority to determine, on remand, whether to excuse any failure by the Petitioner to exhaust the particular social group issue.

The Ninth Circuit previously had noted, in *Barron v. Ashcroft*, 358 F.3d 674 (2004), that 8 U.S.C. § 1252(d)(1) "specifically mandates that the exhaustion of administrative remedies is a prerequisite to our jurisdiction." *See Barron*, 358 F.3d, at 677. Yet

while *Barron* and other Ninth Circuit cases assume that the exhaustion of issues implicates subject matter jurisdiction, the cases do not – in analyzing the source of the issue exhaustion requirement – differentiate between exhaustion required by regulation and statutorily-mandated, jurisdictional exhaustion.[2] *See Barron*, 358 F.3d, at 677-78; *Rendon v. Mukasey*, 520 F.3d 967, 971-73 (9th Cir. 2008); *Morales-Alegria v. Gonzales*, 449 F.3d 1051, 1058-59 (9th Cir. 2006); *Abebe v. Gonzales*, 432 F.3d 1037, 1040-41 (9th Cir. 2005) (en banc); *Zara v. Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004). The distinction is nonetheless vital to interpreting the precise character of an immigrant's issue exhaustion burden. Though issue exhaustion and the exhaustion of remedies (the filing of all necessary administrative appeals antecedent to the initiation of judicial review) are no doubt related, the issue exhaustion requirement does not proceed invariably from the remedy exhaustion requirement. *See, e.g.*, *Zhong v. U.S. Department of Justice*, 489 F.3d 126 (2d Cir. 2007) (Calabresi, J., concurring in the denial of rehearing en banc). That

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[2] For example, in *Farhoud v. I.N.S.*, 122 F.3d 794 (9th Cir. 1997), the court of appeals explained that "[f]ailure to raise an issue below constitutes failure to exhaust administrative remedies and 'deprives this court of jurisdiction to hear the matter.'" yet qualified the explanation by noting that "[t]here are exceptions to the exhaustion requirement." *See id.*, at 796. Such reasoning has since been invalidated by this Court, which subsequently has held that a failure to comply with a true jurisdictional defect cannot be pardoned or overlooked. *See Bowles v. Russell*, 551 U.S. 205 (2007).

is, a remedy exhaustion requirement can exist independently of an issue exhaustion requirement.

Congress has not expressly mandated issue exhaustion in immigration cases; consequently, no such jurisdictional exhaustion requirement exists.[3] The plain language of 8 U.S.C. § 1252 does not refer to issue exhaustion. The statute merely prescribes that, to exhaust his or her administrative appeal properly, an immigrant seeking judicial review of a deportation

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[3] Because (1) only Congress may enlarge or constrict the jurisdiction of the federal courts (notwithstanding the constitutionally-ordained jurisdiction of this Court), *see* U.S. CONST. art. I, § 8; art. III, § 2, cl. 1-2; and, because (2) Congress and the Constitution are therefore the exclusive sources of federal jurisdiction, *accord United States v. Jacobo Castillo*, 496 F.3d 947, 954 (9th Cir. 2007) (en banc), no regulatory exhaustion rule can be construed as jurisdiction-stripping – at least not without risk of abrading the Constitutional non-delegation doctrine, by usurping a legislative prerogative. *See* U.S. CONST. art. I, § 1; *accord Owens v. Republic of Sudan*, 531 F.3d 884, 889-92 (D.C. Cir. 2008) (the Executive's authority to endow a federal court with jurisdiction over a suit against a foreign sovereign by making a factual finding that the sovereign is a terrorism sponsor does not violate the non-delegation doctrine); *id.*, at 891 (distinguishing between a delegation permitting the Executive to determine the conditions under which a court will possess jurisdiction and a delegation permitting the Executive to make factual findings affecting jurisdiction; noting the Executive's great power over foreign affairs and immigration).

Where a court retains jurisdiction over an appeal, it necessarily retains the inherent authority to excuse a party's failure or inability to satisfy a non-jurisdictional exhaustion requirement. *Cf. McCarthy v. Madigan*, 503 U.S. 140, 146 (1992).

order must first obtain a final disposition[4] from the Board of Immigration Appeals. *See Zhong*, 489 F.3d, at 129 (noting "the absence of an issue exhaustion requirement in the language of § 1252(d)(1)"); *id.*, at 131 n.8 (" . . . § 1252(d)(1) . . . does not expressly provide for an *issue* exhaustion requirement at all, much less say that any such requirement would be jurisdictional") (emphasis supplied); *cf. Grullon v. Mukasey*, 509 F.3d 107, 112 (2d Cir. 2007), *certiorari denied*, 129 S.Ct. 43 (2008) ("One of the administrative remedies available to the alien as of right is an appeal to the BIA. In this way, Congress has instructed the courts that they may not review a final order of removal unless the alien has appealed to the BIA.").

If there were any doubt about the fundamental distinction between issue exhaustion and the exhaustion of remedies, it was dispelled by *Sims v. Apfel*, 530 U.S. 103 (2000). The *Sims* Court held that a Social Security claimant need not raise particular issues for review by the Social Security Appeals Council, in order to preserve the issues for judicial consideration. *See id.*, at 112 ("Claimants who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues."). Justice Thomas, writing for the Court, explicitly

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[4] Certification to the Attorney General, *see* 8 C.F.R. § 1003.1(h), is not "available . . . as of right," *cf.* 8 U.S.C. § 1252(d)(1).

declined to conflate the remedy and issue exhaustion doctrines:

> Nevertheless, the Commissioner [of Social Security] contends that we should require issue exhaustion in addition to exhaustion of remedies. That is, he contends that a Social Security claimant, to obtain judicial review of an issue, not only must obtain a final decision on his claim for benefits, but also must specify that issue in his request for review by the Council. (Whether a claimant must exhaust issues before the ALJ is not before us.) The Commissioner argues, in particular, that an issue-exhaustion requirement is "an important corollary" of any requirement of exhaustion of remedies. Brief for Respondent 13. We think that this is not necessarily so and that the corollary is particularly unwarranted in this case.

Id., at 107. Thus, *Sims* rejects the idea that issue and remedy exhaustion are exclusively interdependent.

Sims also suggests the proposition that, in order for an issue exhaustion requirement to be jurisdictional, it must be commanded by statute. While the *Sims* Court refused to find that such an issue exhaustion rule applies in Social Security Act cases, the Court noted that any such requirement (in the Social Security context) would be a judicial creation, not jurisdictional. *See Sims*, 530 U.S., at 106 n.1 (citing *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976)). The *Sims* Court explained:

> Initially, we note that requirements of administrative issue exhaustion are largely creatures of statute. *Marine Mammal Conservancy, Inc. v. Department of Agriculture*, 134 F.3d 409, 412 (C.A.D.C. 1998). Our cases addressing issue exhaustion reflect this fact. For example, in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 102 S.Ct. 2071, 72 L.Ed.2d 398 (1982), we held that the Court of Appeals lacked jurisdiction to review objections not raised before the National Labor Relations Board. We so held because a statute provided that "'[n]o objection that has not been urged before the Board . . . shall be considered by the court.'" *Id.*, at 665, 102 S.Ct. 2071 (quoting 29 U.S.C. § 160(e) (1982 ed.)). Our decision in *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497-498, 75 S.Ct. 467, 99 L.Ed. 583 (1955), followed similar reasoning. *See also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36, n.6, 73 S.Ct. 67, 97 L.Ed. 54 (1952) (collecting statutes); *Washington Assn. for Television and Children v. FCC*, 712 F.2d 677, 681-682, and n.6 (C.A.D.C. 1983) (interpreting issue-exhaustion requirement in 47 U.S.C. § 405 (1982 ed.) and collecting statutes). Here, the Commissioner does not contend that any statute requires issue exhaustion in the request for review.

Sims, 530 U.S., at 107-108.

As a corollary, it should be added that, particularly in the wake of *Kucana v. Holder*, 558 U.S. ___, 130 S.Ct. 827 (2010), the argument that an immigration

regulation may serve as the source of a jurisdictional issue exhaustion requirement also must be rejected. Chief Judge Jacobs, dissenting from the denial of rehearing en banc in *Zhong*, appeared to argue that the federal regulation mandating the exhaustion of issues before the Board, 8 C.F.R. § 1003.3(b), imparts a jurisdictional requirement. *See Zhong v. U.S. Department of Justice*, 489 F.3d 126, 136 (2d Cir. 2007) (Jacobs, C.J., dissenting from the denial of rehearing en banc). Especially in the light of *Kucana*, this cannot be. *See Kucana*, 130 S.Ct., at 839-40; *see also McCarthy*, 503 U.S., at 149. In *Kucana*, the Court confirmed that all jurisdictional bars to the judicial review of deportation orders are statutory. *See Kucana*, 130 S.Ct., at 839-40 ("Finally, we stress a paramount factor in the decision we render today. By defining the various jurisdictional bars by reference to other provisions in the INA itself, Congress assured that it, and only it, would limit the federal courts' jurisdiction.").

When considered in the light of the plain language of 8 U.S.C. § 1252(d)(1), *Sims* and *Kucana* are inconsistent with the Ninth Circuit's issue exhaustion precedents.

Therefore, this Court should grant the petition for certiorari, so as to clarify that, in immigration cases, issue exhaustion does not implicate subject matter jurisdiction.

B. Though a circuit split exists about whether an immigrant's duty to exhaust issues is jurisdictional, the Second Circuit has adopted the sounder, non-jurisdictional approach

Despite *Sims v. Apfel*, most courts of appeals hold that 8 U.S.C. § 1252(d)(1) imparts a jurisdictional issue exhaustion requirement. Nonetheless, the Second Circuit hews to the sounder position, that the requirement is not jurisdictional. *See Zhong v. U.S. Department of Justice*, 480 F.3d 104, 119 (2d Cir. 2007) (denying reconsideration); *id.*, at 121-22. This Court should grant certiorari in order to approve the position of the Second Circuit.

There are four reasons for overruling the Ninth Circuit and for approving the position adopted by the Second Circuit. They are: (1) that Congress cannot be presumed to have implicitly incorporated an issue exhaustion requirement into 8 U.S.C. § 1252(d)(1); (2) that this Court has taught that judges should avoid "'drive-by jurisdictional rulings'" which confuse jurisdictional questions with other forms of inquiry, *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (citation omitted); (3) that a jurisdictional issue exhaustion requirement will impose incalculable investigatory demands upon the courts of appeals; and (4) that a jurisdictional issue exhaustion requirement will flout this Court's canon preferring statutory interpretations which preserve the right to judicial review over final agency actions.

1. SURVEY OF THE NATIONAL LAW CONSTRUING THE IMMIGRATION APPEAL ISSUE EXHAUSTION REQUIREMENT

As is stated above, apart from the Second Circuit, most courts of appeals interpret the immigration case issue exhaustion requirement as being jurisdictional – though some do so with reservations. Panels of the First and Third Circuits have questioned the correctness of a jurisdictional issue exhaustion rule. *See Sousa v. I.N.S.*, 226 F.3d 28, 31 (1st Cir. 2000); *Lin v. Attorney General of U.S.*, 543 F.3d 114, 120 n.6 (3d Cir. 2008). In *Etchu-Njang v. Gonzales*, 403 F.3d 577 (8th Cir. 2005), the Eighth Circuit entertained the possibility (but did not explicitly hold) that issue exhaustion implicates jurisdiction. The court chiefly relied upon the argument that, because Congress was presumably aware that 8 U.S.C. § 1105a(c) (1994) (the Immigration and Nationality Act's previous judicial review statute) had been interpreted as including a jurisdictional issue exhaustion requirement, Congress could have expressly disclaimed this interpretation when it enacted 8 U.S.C. § 1252(d)(1), in 1996. *See id.*, at 582-83.

The *Etchu-Njang* Court made no effort, however, substantively to justify the view that 8 U.S.C. § 1252(d)(1) commands issue exhaustion. *Cf. Etchu-Njang*, 403 F.3d, at 581-83; *id.*, at 581. Ultimately, the court of appeals side-stepped the issue; it elected to consider whether the petitioner qualified for purported exceptions to the exhaustion rule, determined that he

did not, and then dismissed his appeal. *See id.*, at 584.

(Below, the Ninth Circuit did not consider whether the Petitioner qualified for purported exceptions to the exhaustion rule. The Ninth Circuit merely dismissed for want of jurisdiction. App. to Pet. for Cert., at pp. 1-2. As such, the Ninth Circuit's disposition may only be sustained if the Ninth Circuit's interpretation of 8 U.S.C. § 1252(d)(1) is correct.)

More recently, the Eighth Circuit has described itself as being "split" on the jurisdictional question. *Romero-Reyes v. Holder*, 362 Fed.Appx. 568, 570 (8th Cir. 2010) (not selected for publication) (citing *Mambwe v. Holder*, 572 F.3d 540, 550 (8th Cir. 2009)). The Seventh Circuit appears split as well. *Cf. Korsunskiy v. Gonzales*, 461 F.3d 847 (7th Cir. 2006), *with Pjetri v. Gonzales*, 468 F.3d 478, 481 (7th Cir. 2006).

By contrast, the Fourth and Fifth Circuits have concluded unequivocally that 8 U.S.C. § 1252(d)(1) sets forth a jurisdictional issue exhaustion rule.[5] In *Massis v. Mukasey*, 549 F.3d 631 (4th Cir. 2008), *certiorari denied sub nom., Massis v. Holder*, 130 S.Ct. 736 (2009), the Fourth Circuit held that the statute erects a jurisdictional issue exhaustion bar.

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[5] The Sixth and Eleventh Circuits also interpret 8 U.S.C. § 1252(d)(1) as jurisdictional. *See Ramani v. Ashcroft*, 378 F.3d 554, 558-59 (6th Cir. 2004); *Fernandez-Bernal v. Attorney General of U.S.*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001).

See Massis, 549 F.3d, at 638-40. Disapproving the reasoning in *Zhong* – from which it contended that the Second Circuit has "since retreated" in *Grullon v. Mukasey*, 509 F.3d 107 (2d Cir. 2007), *certiorari denied*, 129 S.Ct. 43 (2008) – the Fourth Circuit determined that *Bowles v. Russell*, 551 U.S. 205 (2007) precludes the courts of appeals from excusing immigrants' administrative forfeiture (or waiver) of issues. *Cf. Massis*, 549 F.3d, at 639. Echoing *Massis*, the Fifth Circuit has embraced similar reasoning in *Omari v. Holder*, 562 F.3d 314, 324-25 (5th Cir. 2009).[6]

Massis and *Omari* are wrongly decided because they erroneously construe *Russell* as abrogating *Sims*. *Cf. Massis*, 459 F.3d, at 639; *Omari*, 562 F.3d, at 324. *Russell* does no such thing. *Russell* says that a statutory pre-condition to the filing of a justiciable appeal cannot be excused by a court. *Cf. Russell*, 551 U.S., at 210-12. Thus, *Russell* confirms that, since 28 U.S.C. § 2107(c) instructs that a trial court may reopen the time for perfecting a civil appeal for a

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[6] Contrary to the view of the *Massis* Court, the Second Circuit did not retreat from *Zhong* in *Grullon v. Mukasey*, 509 F.3d 107 (2d Cir. 2007), *certiorari denied*, 129 S.Ct. 43 (2008). In *Grullon*, the court held that an alien's failure to appeal a removal order to the Board of Immigration Appeals – *a classic instance of the failure to exhaust remedies* – deprived the court of jurisdiction over his claims. *See Grullon*, 509 F.3d, at 114 (citing *Zhong*, 480 F.3d, at 118). The court interpreted *Bowles* as abrogating the "manifest injustice" exception to this jurisdictional exhaustion defect. *See Grullon*, 509 F.3d, at 109 (discussing *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 53 (2d Cir. 2004)).

period of fourteen days, the trial judge therein was without authority to grant a seventeen day reopening period. *See Russell*, 551 U.S., at 214. *Russell* is consistent with the Petitioner's view that, because 8 U.S.C. § 1252(d)(1) does not expressly adjure issue exhaustion, issue exhaustion is not jurisdictional in appeals prosecuted thereunder. *See Russell*, 551 U.S., at 213 ("Like the initial 30-day period for filing a notice of appeal, the limit on how long a district court may reopen that period is set forth in a statute, 28 U.S.C. § 2107(c). Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple 'claim-processing rule.'"); *see also United States v. Jacobo Castillo*, 496 F.3d 947 (9th Cir. 2007) (en banc) (any failure by a criminal defendant to enter properly a conditional plea of guilty could not divest the court of appeals of subject matter jurisdiction over his appeal), *id.*; at 954 (" . . . only Congress [not the Federal Rules of Criminal Procedure, which do not create or abridge substantive rights] can confer or divest the lower federal courts of subject matter jurisdiction").

The existence of the circuit split favors a grant of certiorari.

2. FOUR ADDITIONAL CONSIDERATIONS AGAINST THE NINTH CIRCUIT'S POSITION

Four additional considerations which militate against the position adopted by the Ninth Circuit are:

(1) that Congress cannot be presumed to have implicitly incorporated an issue exhaustion requirement into 8 U.S.C. § 1252(d)(1); (2) that this Court has taught that the courts of appeals should avoid "'drive-by jurisdictional rulings'" which confuse jurisdictional questions with other forms of inquiry, *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (citation omitted); (3) that a jurisdictional issue exhaustion requirement will impose incalculable investigatory demands upon the courts of appeals; and (4) that a jurisdictional issue exhaustion requirement will flout the Court's canon preferring statutory interpretations which preserve the right to judicial review over final agency actions.

1. First, the Eighth Circuit's suggestion that Congress approved a jurisdictional issue exhaustion rule when it enacted 8 U.S.C. § 1252(d)(1) must be rejected. On its face, 8 U.S.C. § 1252(d)(1) does not mandate that immigrants exhaust issues. The plain reading of the law must be the end of the matter.

1a. Because the text of 8 U.S.C. § 1252(d)(1) does not expressly command issue exhaustion, there is no statutory requirement to exhaust issues. Therefore, resort to legislative history – of which the Eighth Circuit's presumption (about congressional intent in enacting 8 U.S.C. § 1252(d)(1), *see Etchu-Njang*, 403 F.3d, at 582-83) is arguably a form – is

inappropriate.[7] *See Whitfield v. United States*, 543 U.S. 209, 215 (2005) ("Because the meaning of [18 U.S.C.] § 1956(h)'s text is plain and unambiguous, we need not accept petitioners' invitation to consider the legislative history."); *cf. Koons Pontiac Buick GMC, Inc. v. Nigh*, 543 U.S. 50, 73 (2004) (Scalia, J., dissenting) ("Needless to say, I also disagree with the Court's reliance on things that the sponsors and floor managers of the 1995 [Truth in Lending Act] amendment *failed* to say. I have often criticized the Court's use of legislative history because it lends itself to a kind of ventriloquism.") (footnote omitted) (emphasis supplied).[8]

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[7] The Conference Report prepared for the Illegal Immigration Reform and Immigrant Responsibility Act, enacted on September 30, 1996, 110 Stat. 3009-546, provides, in pertinent part: "Section 242(d) [8 U.S.C. § 1152(d)] restates the provisions in the first and third sentences of subsection (c) of current section 106 [8 U.S.C. § 1105a] requiring that a petitioner have exhausted administrative remedies. . . ." H.R. Conf. Rep. 104-828, at 220.

[8] That IIRIRA was aimed at curbing immigrants' access to the courts is irrelevant to resolution of the question, whether 8 U.S.C. § 1252(d)(1) implicitly adopts a jurisdictional issue exhaustion requirement. Assuming that, in enacting IIRIRA, Congress was fixated upon changing the immigration laws in order to keep immigrants from filing deportation appeals, it is reasonable to suppose that, if Congress had wished to create or fortify a jurisdictional issue exhaustion rule, it could have inserted express language to this effect into 8 U.S.C. § 1252, so that there would be no doubt whatever about the statutory command or legislative intent.

In any event, because 8 U.S.C. § 1252(d)(1) does not clearly mandate issue exhaustion, IIRIRA policy should not influence

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1b. As is noted by the *Zhong* Court, rejection of a jurisdictional issue exhaustion requirement proceeds also from the observation that Congress possesses demonstrable experience in drafting statutes which strip the courts of appeals of subject matter jurisdiction over issues that petitioners did not press before Executive Branch agencies; and, by this token, that Congress, if it wished, was fully competent to write an issue exhaustion requirement into 8 U.S.C. § 1252(d)(1). *Cf. Vaden v. Discover Bank*, 129 S.Ct. 1262, 1272 n.9 (2009) (in construing the Federal Arbitration Act, noting that 9 U.S.C. § 203 and

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this Court's interpretation of the law. In the analogous context of review of civil actions brought under the Prison Litigation Reform Act, legislation in respect of which "exhaustion was a 'centerpiece,'" *Jones v. Bock*, 549 U.S. 199, 214 (2007) (citation omitted), Chief Justice Roberts, writing for a unanimous Court, reversed the Sixth Circuit's practice of requiring that PLRA plaintiffs specifically plead exhaustion in their trial court complaints. *Id.*, at 211-12. The Chief Justice rejected the idea that, since the PLRA was passed in order to crack down on unexhausted prisoner lawsuits, the Sixth Circuit's practice was proper. *See id.*, 549 U.S., at 212 ("The PLRA dealt extensively with the subject of exhaustion, *see* 42 U.S.C. § 1997e(a), (c)(2), but is silent on the issue whether exhaustion must be pleaded by the plaintiff or is an affirmative defense. This is strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense. *In a series of recent cases, we have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns.*") (emphasis added); *id.*, at 212-13 (discussing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 63 (1993); *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002); *Hill v. McDonough*, 547 U.S. 573 (2006)).

9 U.S.C. § 205 "demonstrate that 'when Congress wants to expand [federal-court] jurisdiction, it knows how to do so clearly and unequivocally'") (citation omitted); *Massachusetts v. E.P.A.*, 549 U.S. 497, 537 (2007) (Roberts, C.J., dissenting) (attacking the majority's gloss on 42 U.S.C. § 7521(a)(1)), *with* 15 U.S.C. § 77i(a) (Securities Act of 1933); 15 U.S.C. § 78y(c)(1) ("No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Court or there was reasonable ground for failure to do so.") (Securities and Exchange Act of 1934); 29 U.S.C. § 160(e) (National Labor Relations Act); 29 U.S.C. § 210(a) (Fair Labor Standards Act).[9] On a related note, the First Circuit has observed that "Congress knows how to bar claims in the immigration context when it desires to do so." *See Aguilar v. U.S. Immigration and Customs Enforcement*, 510 F.3d 1, 11 n.2 (1st Cir. 2007) (citing 8 U.S.C. § 1252(g)(2)).

In an important criminal appeal, confronted by the argument that 18 U.S.C. § 1956(h), the federal money laundering conspiracy provision, implicitly includes an overt act requirement (as exists in the general federal conspiracy law, 18 U.S.C. § 371, but not in 18 U.S.C. § 1956(h), or in the federal drug conspiracy statute, 21 U.S.C. § 846), this Court dismissed the relevance of legislative history. *See*

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[9] The Administrative Procedure Act does not, on its face, require issue exhaustion. *See* 5 U.S.C. § 704. Nor does the Hobbs Administrative Orders Review Act. *See* 28 U.S.C. § 2349(a).

Whitfield, 543 U.S., at 216-17. The Court held that the use of legislative history was "particularly inapt," since: (1) Congress had knowledge of the judicial gloss on 21 U.S.C. § 846 when it enacted the money laundering conspiracy provision at issue;[10] and, (2) Congress has inserted explicit overt act elements into other conspiracy laws. *See id.* ("As the Government points out, Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so. Where Congress has chosen *not* to do so, we will not override that choice based on vague and ambiguous signals from legislative history.") (citation omitted) (emphasis supplied). *Whitfield* supports the position that – because 8 U.S.C. § 1252(d)(1) does not explicitly require exhaustion of remedies and because Congress has explicitly required such exhaustion elsewhere in the federal books – it is inappropriate for a Court to infer that Congress intended to incorporate an issue exhaustion requirement into 8 U.S.C. § 1252(d)(1).

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[10] Similarly, it could be argued that, in enacting 8 U.S.C. § 1252(d)(1), Congress had knowledge of *Woelke & Romero Framing, Inc. v. National Labor Relations Board et al.*, 456 U.S. 645 (1982).

Perhaps the *Whitfield* Court's observation (about what Congress may have known when it passed 18 U.S.C. § 1956(h)) cuts both ways with regard to the Petitioner's case, as the observation could also be said to validate the Eighth Circuit's presumption. *Cf. Etchu-Njang*, 403 F.3d 577 (8th Cir. 2005). (Nevertheless, as is demonstrated in text, the *Whitfield* Court relied also upon the fact that Congress has enacted other statutes which specifically include overt act elements. *See Whitfield*, 543 U.S., at 216-17.)

It should be added, the presumption that Congress incorporated a jurisdictional issue exhaustion requirement into 8 U.S.C. § 1252(d)(1), may also be overruled by that principle of this Court which provides, that "[w]e do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply. . . ." *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005).[11]

2. Second, "[i]n view of the Supreme Court's series of recent and increasingly powerful opinions cautioning lower federal courts against conflating mandatory with jurisdictional prerequisites," *Zhong*, 489 F.3d, at 128 (citations omitted), the courts of appeals must be prevented from reiterating inexact conceptions of federal subject matter jurisdiction. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-11 (2006) ("unrefined dispositions . . . should be accorded no precedential effect on the question whether the federal court had authority to adjudicate the claim in suit") (internal quotation marks omitted);[12] *cf. United States v. L.A. Tucker*

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[11] The principle is somewhat inapplicable. *See Jama*, 543 U.S., at 341 (" . . . and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest").

[12] *See Arbaugh*, 546 U.S., at 511 ("On the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous. . . . We have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate

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Truck Lines, Inc., 344 U.S. 33, 39 (1952) (Frankfurter, J., dissenting) (noting, in an appeal of an Interstate Commerce Commission order, that "I do not use the term 'jurisdiction' because it is a verbal coat of too many colors."). Though *Arbaugh* is not entirely apposite factually – it overturned the Fifth Circuit's jurisdictional treatment of an element of a discrimination plaintiff's Title VII claim – it nevertheless lends considerable support to the Petitioner's argument that no jurisdictional issue exhaustion requirement applies in immigration cases because none was specified by Congress:

> Of course, Congress could make the employee-numerosity requirement "jurisdictional," just as it has made an amount-in-controversy threshold an ingredient of subject-matter jurisdiction in delineating diversity-of-citizenship jurisdiction under 28 U.S.C. § 1332. But neither § 1331, nor Title VII's jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3) (authorizing jurisdiction over actions "brought under" Title VII), specifies any threshold ingredient akin to 28 U.S.C. § 1332's monetary floor. Instead, the 15-employee threshold appears in a separate provision that "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Given the

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the claim in suit.") (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998)).

> "unfair[ness]" and "waste of judicial resources," App. to Pet. for Cert. 47, entailed in tying the employee-numerosity requirement to subject-matter jurisdiction, we think it the sounder course to refrain from constricting § 1331 or Title VII's jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), and to leave the ball in Congress' court. If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. *See Da Silva* [*v. Kinsho Intern. Corp.*], 229 F.3d, at 361 [(2d Cir. 2000)] ("Whether a disputed matter concerns jurisdiction or the merits (or occasionally both) is sometimes a close question."). But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character. Applying that readily administrable bright line to this case, we hold that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue.

Arbaugh, 543 U.S., at 514-16 (footnote omitted). The Ninth Circuit's theory of jurisdiction is in tension with *Arbaugh*.

3. Third, treating issue exhaustion as jurisdictional will impose "an unbearable burden" on the courts of appeals. *See Zhong v. U.S. Department of Justice*, 489 F.3d 126, 129 (2d Cir. 2007) (Calabresi, J., concurring

in the denial of rehearing en banc) (" . . . it would be virtually impossible, as a practical matter, for us thoroughly to search through the record in *every case* – especially in cases being decided through our Non-Argument Calendar or in summary fashion – in order to discern whether all relevant issues were adequately raised before the agency") (footnote omitted) (emphasis supplied).[13] The courts of appeals will be forced to scour the record of every pending immigration (or similar agency) appeal (including all or some appeals which have already been decided, yet over which the courts retain jurisdiction), conducting independent investigations into whether all of the issues raised by the petitioners have been sufficiently exhausted. Thus, the courts of appeals will assume an inquisitorial, Napoleonic responsibility.

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[13] Citing *Arbaugh*, Judge Calabresi appears to suggest that judgments rendered despite the want of subject matter jurisdiction are open to collateral attack by third parties. *See Zhong*, 489 F.3d, at 129 (citing and discussing *Arbaugh*, 126 S.Ct., at 1237). Such a suggestion advances the Petitioner's cause, but may not be sound with reference to truly final judgments. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations – both subject matter and personal.") (citing *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *Stoll v. Gottlieb*, 305 U.S. 165 (1938)).

By contrast, treating the immigrant's duty to exhaust issues as prudential, will not eviscerate the duty. A court of appeals need not, and should not, reach each and every unexhausted argument posited by a litigant; the litigant bears the burden of convincing the court that his failure to exhaust should be excused.[14]

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[14] It is worth noting, the Ninth Circuit has previously applied the exhaustion doctrine in a manner which is not at all onerous. *See Aden v. Holder*, 589 F.3d 1040, 1047 (2009). In *Aden*, the court of appeals held that a mere prayer for relief which requested that the BIA reverse a denial of protection under the United Nations Convention Against Torture, sufficed to administratively exhaust the petitioner's CAT claim. *See Aden*, 589 F.3d, at 1047 (citing *Zhang v. Ashcroft*, 388 F.3d 713, 721 (9th Cir. 2004)).

The Petitioner's administrative appeal complained of the denial of asylum, withholding of removal, and protection under the United Nations Convention Against Torture. *See* A.R. 23. Thus, the Petitioner satisfied the easy burden imposed by *Aden* and *Zhang*.

Indeed, the court of appeals improperly treated the Petitioner's particular social group argument as if it were a separate claim which was not exhausted. *See* App. to Pet. for Cert., at pp. 1-2. The particular social group argument should be conceived as a subset of the Petitioner's asylum and withholding of removal claims; as such, the particular social group argument is exhausted. *Cf. Citizens United v. Federal Election Commission*, 558 U.S. ___, 130 S.Ct. 876, 893 (2010) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; *parties are not limited to the precise arguments they made below*.") (citing *Lebron v. National Passenger Railroad Co.*, 513 U.S. 374, 379 (1995) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1994)) (internal quotation marks omitted) (emphasis added). Though the terms are often bandied about

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4. Fourth, treating administrative exhaustion as jurisdictional flouts this Court's canon which favors interpreting an ambiguous statutory passage in a manner that preserves judicial review.[15] The Court has this year applied the canon to 8 U.S.C. § 1252(a)(2)(B)(ii), which – the Court concluded – does not permit the Attorney General categorically to shield the denial of a motion to reopen removal proceedings from judicial review:

> Any lingering doubt about the proper interpretation of 8 U.S.C. § 1252(a)(2)(B)(ii) would be dispelled by a familiar principle of statutory construction: the presumption favoring judicial review of administrative action. When a statute is "reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings

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loosely, the Petitioner's ***claim*** is, strictly speaking, to asylum; his ***argument*** – in support of the claim – is that he was persecuted on account of his membership in a particular social group. *See United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) ("As the Supreme Court has made clear, it is claims that are deemed waived or forfeited, not arguments.").

To the extent that *Rendon v. Mukasey*, 520 F.3d 967, 972 (9th Cir. 2008) suggests otherwise, it is in tension with *Aden*.

[15] In *Sun v. Ashcroft*, 370 F.3d 932 (2004), the Ninth Circuit declined to apply this canon in order to interpret the word "review" in 8 U.S.C. § 1252(d)(1) as restricted to petitions for review (as opposed to also including habeas corpus petitions.) *See Sun*, 370 F.3d, at 940-41. Application of the canon would have prevented the court of appeals from imposing what it considered to be the statutory subsection's exhaustion of remedies requirement upon the habeas petitioner therein. *See id.*

> and basic principles: that executive determinations generally are subject to judicial review." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995). We have consistently applied that interpretive guide to legislation regarding immigration, and particularly to questions concerning the preservation of federal court jurisdiction. *See, e.g., I.N.S. v. St. Cyr*, 533 U.S. 289, 298, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001); [*Reno v.*] *Catholic Social Services, Inc.*, 509 U.S., at 63-64, 113 S.Ct. 2485; *McNary* [*v. Haitian Refugee Center, Inc.*], 498 U.S., at 496, 111 S.Ct. 888. Because the "presumption favoring interpretations of statutes [to] allow judicial review of administrative action" is "well-settled," *Catholic Social Services, Inc.*, 509 U.S., at 63-64, 113 S.Ct. 2485 (quoting *McNary*, 498 U.S., at 496, 111 S.Ct. 888), the Court assumes that "Congress legislates with knowledge of" the presumption, *id.*, at 496, 111 S.Ct. 888. *It therefore takes "clear and convincing evidence" to dislodge the presumption. Catholic Social Services, Inc.*, 509 U.S., at 64, 113 S.Ct. 2485 (internal quotation marks omitted). There is no such evidence here.

Kucana v. Holder, 558 U.S. ___, 130 S.Ct. 827, 839 (2010) (emphasis added). Because there is not any "clear and convincing evidence" that 8 U.S.C. § 1252(d)(1) was intended to impose a jurisdictional exhaustion requirement, it must not be interpreted as imposing one.

Accordingly, for all of the foregoing reasons, this Court should grant certiorari; adjudge that any issue exhaustion rule applicable to judicial immigration appeals is not jurisdictional; and adjudge also that the failure to comply with any such rule may be excused – in exceptional circumstances – by the courts of appeals.

The question before the Court is of vital importance to the nationwide development of our immigration jurisprudence. In the Ninth Circuit alone, the question arises with a remarkable frequency which renders a grant of certiorari especially warranted. *See, e.g.*, *Lopez-Navarrete v. Holder*, 2010 WL 4851324 (Nov. 30, 2010) (not selected for publication); *Portillo-Mendez v. Holder*, 2010 WL 4780849 (Nov. 24, 2010) (not selected for publication); *Tionda v. Holder*, 2010 WL 4746148 (Nov. 23, 2010) (not selected for publication); *Orellana-Martinez v. Holder*, 2010 WL 4721196 (Nov. 22, 2010) (not selected for publication); *Hernandez v. Holder*, 2010 WL 4683903 (Nov. 21, 2010) (not selected for publication); *De La Cruz Galvan v. Mukasey*, 2010 WL 2232664 (2010) (not selected for publication); *Vasquez-Aguirre v. Holder*, 362 Fed.Appx. 736, 737 (2010) (not selected for publication); *Michel v. Holder*, 358 Fed.Appx. 980, 982 (2009) (not selected for publication); *Fajardo-Alvarez v. Holder*, 349 Fed.Appx. 198, 199 (2009) (not selected for publication); *Dhaliwal v. Holder*, 349 Fed.Appx. 147, 148-49 (2009) (not selected for publication); *Rodriguez-Vera v. Holder*, 348 Fed.Appx. 280, 281 (2009) (not selected for publication); *Gasparyan v.*

Holder, 339 Fed.Appx. 797, 799 (2009) (not selected for publication); *Yung Ying Shi v. Holder*, 337 Fed.Appx. 666, 668 (2009) (not selected for publication); *Gamboa Najera v. Holder*, 316 Fed.Appx. 693 (2009) (not selected for publication).

There is no advantage to be gained from waiting longer to resolve the 8 U.S.C. § 1252(d)(1) issue exhaustion controversy appropriately. This Court should grant certiorari in order fully and finally to pronounce a uniform national law.

C. Assuming the Court determines that the courts of appeals can waive the issue exhaustion requirement, strong considerations support doing so with respect to the Petitioner's particular social group claim

Assuming the Court determines that the issue exhaustion requirement is not jurisdictional, strong considerations support waiving the (prudential) requirement. *Cf. Laing v. Ashcroft*, 370 F.3d 994, 1000-1001 (9th Cir. 2004).[16] During the course of administrative proceedings, the Petitioner was pro se.

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[16] Should certiorari be granted, and should the Court determine that the issue exhaustion mandate is not jurisdictional, the Court is respectfully asked to remand this case to the court of appeals for a determination about whether the failure to exhaust ought to be waived.

Cf. App. to Pet. for Cert., at pp. 1, 3, 4. He also was detained.[17]

Whatever interest the Government possesses in enforcing the exhaustion requirement herein, the interest pales in the light of the obvious normative and humanitarian interests favoring a relaxation. *Cf. McCarthy v. Madigan*, 503 U.S. 140, 146 (1992) (exhaustion of remedies balancing test).

Thus, the Court should hold that, on remand, the court of appeals may excuse the failure to exhaust.

II. As Applied To The Petitioner, A Jurisdictional Issue Exhaustion Requirement Would Violate The Fifth Amendment Guarantee Of Fundamentally Fair Removal Proceedings.

If this Court agrees with the Ninth Circuit that the 8 U.S.C. § 1252(d)(1) issue exhaustion burden is jurisdictional, it should nevertheless grant certiorari and remand the case to the court of appeals, so that the court of appeals may consider whether the burden, as applied to the Petitioner, is constitutional under the Fifth Amendment Due Process Clause.[18]

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[17] For some indication regarding the Petitioner's detained status, see, for example, the letter addressed by this writer to the court of appeals on May 17, 2010, advising the court that the Petitioner had been released from detention (*i.e.*, during the pendency of his judicial appeal).

[18] Because the court of appeals did not decide the constitutional question, the Court can remand this appeal so that the court

(Continued on following page)

The Fifth Amendment has been violated here. It cannot be said that asylum, withholding of removal, and United Nations Convention Against Torture proceedings involving pro se, detained, non-English speaking asylum seekers are fundamentally fair, where the courts require the immigrants to exhaust their claims properly by raising all relevant legal and factual arguments in their administrative appeals, and where the courts dismiss non-complying appeals, even where persecution or death is a possible consequence of the dismissal. *Cf. Padilla v. Kentucky*, 559 U.S. ___, 130 S.Ct. 1473, 1484 n.11 (2010) (noting – in holding that criminal attorneys must advise their clients of the immigration consequences of various criminal case outcomes – the risk that some immigrants may be killed in their home countries). Because a jurisdictional strip enabled by the congressional exercise of an authority arising from Article III of the Constitution, must yield to the dictate of a subsequent Amendment (the Fifth Amendment), jurisdictional exhaustion here is constitutionally improper.

If the Court is unsure about whether eliminating jurisdiction over the Petitioner's particular social group claim violates the Fifth Amendment, it should nevertheless – after recognizing that 8 U.S.C. § 1252(d)(1) is at best ambiguous – resolve the issue exhaustion controversy discussed *supra* in favor of allowing review. *See I.N.S. v. St. Cyr*, 533 U.S. 289,

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of appeals may explore the question in the first instance. *See Verizon Communications Inc. v. F.C.C.*, 535 U.S. 467, 530 (2002).

299-305 (2001) (constitutional avoidance doctrine applied to interpretation of the interaction of 28 U.S.C. § 2241 and various immigration reform laws, in the face of a "difficult and significant" Suspension Clause question). Such a result is supported also by (what may be termed) the clear statement rule which the Court has reiterated in *Kucana*; that is, the Court ought to decline to find a jurisdictional strip of the right to review over agency action, where – as here – Congress has not explicitly announced its restrictive intent. *See Kucana*, 130 S.Ct., at 839.

CONCLUSION

Wherefore, premises considered, the Petitioner, Nilson Herney Valencia-Riascos, prays that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

MATTHEW PAUL NICKSON
1300 McGowen
Houston, Texas 77004
(713) 655-8880

Counsel of Record for the Petitioner

December 8, 2010

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NILSON HERNEY VALENCIA-RIASCOS, Petitioner, v. ERIC H. HOLDER Jr., Attorney General, Respondent.	No. 09-70384 Agency No. A089-246-582 MEMORANDUM* (Filed Jun. 14, 2010)

On Petition for Review of an Order of the Board of Immigration Appeals

Argued and Submitted June 8, 2010
Seattle, Washington

Before: CANBY, CALLAHAN and IKUTA, Circuit Judges.

Nilson Herney Valencia-Riascos, a citizen of Colombia, petitions for review of an order of the Board of Immigration Appeals ("BIA") summarily dismissing his appeal from an immigration judge's ("IJ") denial of his application for asylum, withholding of removal, and relief under the Convention Against Torture.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Valencia-Riascos challenges the IJ's finding that he was ineligible for asylum because he failed to establish a nexus between his feared persecution and his membership in a particular social group consisting of the family members of his step-father. Valencia-Riascos's *pro se* Notice of Appeal to the BIA, however, even construed liberally, *see, e.g., Barron v. Ashcroft*, 358 F.3d 674, 676 n.4 (9th Cir. 2004), provided the agency no notice that he was appealing the IJ's particular social group finding. Valencia-Riascos's failure to raise the particular social group issue before the BIA constitutes a failure to exhaust administrative remedies, depriving us of jurisdiction to entertain the claims raised in Valencia-Riascos's petition for review. *Cordon-Garcia v. INS*, 204 F.3d 985, 988 (9th Cir. 2000); *see also Barron*, 358 F.3d at 678. The petition for review is, accordingly,

DISMISSED.

APPENDIX B

U.S. Department of Justice
Executive Office of
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A089 246 582 – Tacoma, WA

Date: JAN 15 2009

In re: NILSON HERNEY VALENCIA-RIASCOS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Asylum; Withholding of Removal; Convention Against Torture

ORDER: The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/ Linda S. Wendtland
FOR THE BOARD

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

Tacoma, Washington

File A 89 246 582 Date: October 23, 2008

In the Matter of

NILSON HERNEY VALENCIA-RIASCOS	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGE: Section 212(a)(6)(A)(1)

APPLICATIONS: Asylum; Withholding of Removal; Relief Under the Convention Against Torture

APPEARANCES:

ON BEHALF OF RESPONDENT:

Pro se

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

Thomas P. Molloy, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

These proceedings were commenced with the filing of a Notice to Appear with the Immigration Court on August 14, 2008. The Respondent is alleged to be a native and citizen of Colombia who arrived in the United States on or about June 1, 2008, and was not then admitted or paroled after inspection by an

Immigration Officer. He is charged under Section 212(a)(6)(A)(1) of the Act. In response to the Notice to Appear Respondent admitted the factual allegations, the charge was therefore sustained. The Court finds that removability has been established by clear and convincing evidence. Respondent refused to designate a country to which removal could be ordered. Should removal become necessary the Court designated Colombia based on Respondent's admission of birth and citizenship in that country.

Removability having been established by clear and convincing evidence the Court will turn its attention to Respondent's Applications for Relief. The Court notes that Respondent appeared unrepresented throughout these proceedings. Respondent's rights were thoroughly explained to him including his right to Counsel. Respondent was unable to retain Counsel and therefore elected to proceed pro se.

Respondent was the only witness who testified in these proceedings. Respondent testified substantially as follows:

Respondent was from the town of Buenaventura in Colombia. This is a coastal fishing town. Respondent's step-father worked as a Captain of a fishing boat. Respondent worked as a sailor on the fishing boat captained by his step-father. In July of 2004 several members of the guerilla group who Respondent identifies as the "FAR" boarded the Respondent's step-father's fishing boat. It appears that Respondent was referring to the guerilla group known as the FARC. The members of the FARC were armed. They

demanded to speak to the Captain who was Respondent's step-father. They demanded fuel and part of the fishing catch, and also demanded that Respondent's step-father collaborate with them and perform certain errands or tasks for them. They said that if Respondent's step-father did not agree he would be killed. Respondent's step-father told the FARC that he would not be able to comply with their demands since he worked for a company and would lose his job if he turned over any of the fuel or the catch to the FARC, or if he agreed to collaborate with them in any way. Members of the FARC left the fishing boat without further incident. However, Respondent and his step-father were frightened by the threats and moved temporarily to another town, Tulua, where Respondent had relatives. Respondent's step-father was restless because he could not fish in Tulua and had no way to make a living there. He therefore returned to Buenaventura to fish. About two weeks later he was found dead. Respondent testified that no arrests were made in his step-father's assassination. Respondent and his mother returned from Tulua to Buenaventura to make the funeral arrangements. At the wake several members of the FARC came asking for Respondent, Respondent was hidden and managed to escape. Respondent went to the city of Cali for about ten days then went back to Tulua. He opened a hair salon in Tulua where he worked for about three weeks. However, members of the FARC came asking about him and said that he would not be able to escape. Respondent then closed the hair salon and fled to Cartagena. Respondent testified that from that

time on he kept moving from city to city. He never felt safe because wherever he went there would be threatening groups of people who would ask who he was and where he was from. Respondent figured that it was only a matter of time before he was discovered by the FARC.

Respondent testified that Colombia is generally unstable and that there is ongoing warfare between paramilitary groups and the FARC, that people are frequently forced to take sides, that if they do not agree to work for one side they face reprisals from the group they have refused, if they agree to work for that group they face reprisals from opposing groups.

In 2005 Respondent went to make a complaint regarding the threats against him. He explained that this was not a police station but rather a court. The complaint was made before a Judge. Respondent made this complaint hoping to procure some form of protection from the Police. However, the Police did nothing and there was no follow-up to his complaint.

Respondent testified that he believes that he would be killed in the same way that his step-father was. He testified that many of the young people with whom he grew up have been recruited by the guerillas and are now crazed killers.

On cross-examination Respondent testified that he has fathered six children with five different women and that before coming to the United States he supported his children through his own labor. He testified that when he was arrested by immigration

he was with a girl whom he had met shortly before and with whom he was traveling.

He testified that he had no involvement in political groups in Colombia nor did his step-father, but that he and his step-father would vote in political elections like all Colombian citizens.

He testified that he was planning to apply for Asylum in the United States, however he did not do so until he was arrested by immigration because he wanted to get the advice of a knowledgeable person before submitting an Application. Respondent's mother and sisters still reside in Colombia.

When asked why the FARC would target Respondent given that he was not a person responsible for making decisions about whether or not to turn over fuel or part of the catch to the guerillas, Respondent testified that when a person is killed by the guerillas the guerillas fear that that person's relatives will want to take revenge and join opposing groups such as the paramilitary groups. Therefore the FARC is motivated to eliminate such people. Respondent testified that he has never joined any paramilitary group and is not interested in doing so. Respondent performed obligatory Military service for 18 months when he was 18 years old. This would have been several years before the incident in the fishing boat.

On re-direct Respondent testified that he was shot once when a paramilitary group opened fire on a group of young people playing soccer in a soccer field. Respondent was wounded in the leg. This was in

approximately 2003 prior to the incident in the fishing boat. Respondent testified that he did not include this in his Application because it was not related to his case and because he was not seriously injured. Respondent testified that although he did not have personal knowledge of who was shooting or why witnesses gave information leading Respondent to believe that it was the paramilitary groups who opened fire and not the FARC.

In order to qualify for Asylum Respondent must establish persecution or a well-founded fear of persecution based on his race, religion, nationality, membership in a particular social group, or political opinion. He must establish a genuine fear of persecution and further show that this fear is well-founded. The Court notes that Respondent is not barred from Asylum under Section 208(a)(2)(B) in that he submitted his Application within one year of entering the United States. The Court further notes that Respondent's Application is governed by the REAL ID Act.

The Government concedes that Respondent testified credibly in these proceedings, and the Court so finds Respondent testified consistently in what appeared to the Court to be an entirely straight forward manner. Respondent submitted documentation corroborative of his claim. The Court notes that not all of Respondent's documents were admitted into this record because of defects in translation or lack of translation. However, the Court notes that Respondent is proceeding pro se and does not speak English and has been detained throughout these

proceedings. The Court believes that Respondent made a good faith effort to corroborate his claim. The Government does not contest this. The Government however, opposes a grant of Asylum in this matter arguing that Respondent has not established a nexus to a protected ground. Respondent did not in his testimony identify a specific protected ground that he was asserting in his Application Form marked into the record as Exhibit 2. Respondent indicated that he was applying for Asylum on the basis of his political opinion. However, since Respondent is unrepresented the Court believes it appropriate to move beyond his Application and the asserted protected ground to determine whether any other protected grounds are implicated in this case.

The Court can not find that Respondent has a well-founded fear of persecution on account of his political opinion. Respondent never asserted any political opinion to the FARC and there is no reason why the FARC would attribute any particular political opinion to him. Respondent's step-father was murdered presumably by the FARC because he refused to provide material aid or collaboration with the FARC. This does not mean however that he was killed on account of his political opinion. Respondent testified that his step-father asserted that he could not help the FARC because this would cause problems with the company for whom he worked and that he could lose his job. There is no indication on this record that the FARC was motivated to punish

Respondent's step-father for any other reason then his refusal to cooperate with them.

The Government argues, and the Court agrees, that this case is similar to the Supreme Court decision in *INS v. Elias-Zacarias,* 502 U.S. 478 (1992). In that case the Applicant for Asylum had asserted eligibility for Asylum based on threats received from guerilla groups when he refused to collaborate with them. As in that case, here, Respondent's step-father's refusal to collaborate implicated no political opinion. The Court finds that Respondent does not have a well-founded fear of persecution on account of his political opinion.

The Court must determine whether there is any other ground implicated in this case. The Court believes it could be argued that Respondent fears persecution on account of his membership in the particular social group of relatives of his step-father or crew members on his step-father's boat. However, there is no indication that the other crew members on Respondent's step-father's boat suffered any reprisals from the FARC. As to Respondent's membership in the group of family members of Respondent's step-father, the Court notes that Respondent's other relatives, his mother and his sisters, continue to reside in Colombia. Respondent testified that the FARC would want to harm him because they feared that he would join a paramilitary group or some other group opposing the FARC. This would presumably place him in a situation situated differently from his mother and sisters since presumably it would be less

likely that females would join paramilitary groups. The Court finds however, that Respondent's analysis of the situation is somewhat speculative and it is unclear to what extent Respondent's step-father may have other male relatives still living in Colombia. The Court finds that Respondent has not established a nexus to a protected ground, his Applications for Asylum and Withholding are therefore denied. The Court notes that in order to be eligible for Withholding under Section 241(b)(3) Respondent must also establish a nexus to a protected ground.

The Court will next turn it's attention to Respondent's Application for Withholding Under the Convention Against Torture. Relief Under the Convention Against Torture requires that Respondent establish that it is more likely than not that he would be tortured in his country. Unlike Withholding and Asylum there is no requirement that Respondent establish a nexus to a protected ground. However, the torture must be inflicted for one of four purposes: (1) for obtaining information or a confession, (2) for punishing for an act committed or suspected of having been committed, (3) for intimidation or coercion, or (4) for any reason based on discrimination of any kind.

The harm that Respondent fears is certainly grave enough to amount to torture, which is defined as any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person. Respondent fears being killed as his step-father was and testified that guerilla groups in Colombia

sometimes behead their victims and deliver the victims' heads to the victims family.

The Court must then determine whether it is more likely than not that Respondent would suffer such treatment and whether such treatment would be with the consent or acquiescence of a public official or other person acting in an official capacity.

The Court will first address the question of likelihood of torture. Respondent has never been harmed specifically by the guerillas in any physical sense, however, he has been sought by the guerillas and the Court believes it reasonable to assume that if the guerillas were to capture him he would be dealt with the same as his step-father. The Court notes that Respondent was successful in avoiding this fate for approximately three years between the time when his stepfather's vessel was boarded by the guerillas and when he left Colombia in late 2007. Respondent traveled from city to city and was not apprehended by the FARC. Respondent fears however that he would eventually be found out and captured. The Court believes that there is certainly a possibility that this would occur. The Court however can not find that it is more likely than not. After Respondent left Tulua there is no indication that he was specifically sought for by the guerillas in any other city. In addition the Court can not find that if Respondent were apprehended by the guerillas that any treatment of him would be with the consent or acquiescence of a public official. The Court will credit Respondent's testimony that the Government provided him with no

assistance. The Court, however, believes that this is a different standard then consent or acquiescence which requires that the Government turn a blind eye to harm to the Respondent.

In this case the Court has reviewed the Department of State Report which is in many senses corroborative of the type of problems described by Respondent. However, the report also indicates that the Government has been attempting to control the FARC for a very long time. The fact that they have not been successful in providing a protection to the entire civilian population is not indicative of consent or acquiescence.

The Court regrets that the provisions of law which the Court must apply in this case do not offer adequate protection to the Respondent. The Court believes in fact that Respondent may undergo some danger if returned to Colombia. The Court finds however that the provisions of law are inadequate to provide him protection.

Accordingly the following Order shall enter:

ORDER

Respondent's Applications for Asylum, Withholding of Removal, and Relief Under the Convention Against Torture are hereby denied.

Respondent is ordered removed from the United States to Colombia on the charge contained in the Notice to Appear.

/s/ _____
MIRIAM R. HAYWARD
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before MIRIAM R. HAYWARD, in the matter of:

NILSON HERNEY VALENCIA-RIASCOS

A 89 246 582

Tacoma, Washington

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Rhonda E. Priest
Rhonda E. Priest, Transcriber

YORK STENOGRAPHIC
SERVICES, INC.
34 North George Street
York, Pennsylvania 17401-1266
(717) 854-0077

December 5, 2008
Completion Date

rep/seh

APPENDIX D

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1623 East J Street, Suite 3
Tacoma, WA 98421

In the Matter of: **VALENCIA-RIASCOS, NILSON HERNEY**
Respondent

Case No.: **A 089-246-582**
IN REMOVAL PROCEEDINGS

[AMENDED]
ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on **10/23/2008**. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion of the case.

[X] The respondent was ordered removed from the United States to Colombia.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ to _____ upon posting a bond in the amount of $_____ with the alternate order of removal to _____.

Respondent's application for:

[X] Asylum was
( ) granted (X) denied ( ) withdrawn.

[X] Withholding of removal was
( ) granted (X) denied ( ) withdrawn.

[ ] A Waiver under Section _____ was
( ) granted ( ) denied ( ) withdrawn.

[ ] Cancellation of removal under section 240A(a) was
( ) granted ( ) denied ( ) withdrawn.

Respondent's application for:

[ ] Cancellation of removal under section 240A(b)(1) was
( ) granted ( ) denied ( ) withdrawn.
If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation of removal under section 240(b)(2) was
( ) granted ( ) denied ( ) withdrawn.
If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for adjustment of status under section _____ of the INA was
( ) granted ( ) denied ( ) withdrawn.
If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[X] Respondent's application for (X) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was
( ) granted (X) denied ( ) withdrawn or
( ) other.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until ___/___/____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date: 10/23/08 /s/ Miriam Hayward
Miriam Hayward
Immigration Judge

Appeal: ~~WAIVED~~ / RESERVED (A / I / B)

Appeal Due By: 11/24/08

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL SERVICE (P) FAX (F)

TO: [ ] ALIEN [✓] ALIEN c/o Custodial Officer
[ ] ALIEN's ATT/REP [P] DHS

DATE: **10/23/08** BY: COURT STAFF **IJ: MH**

Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List

Q6

APPENDIX E

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1623 East J Street, Suite 3
Tacoma, WA 98421

In the Matter of — Case No.: **A 089-246-582**

VALENCIA-RIASCOS, NILSON HERNEY

Respondent — IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on **10/23/2008**. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion of the case.

[X] The respondent was ordered removed from the United States to Colombia.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ to _____ upon posting a bond in the amount of $_____ with the alternate order of removal to _____.

Respondent's application for:

[X] Asylum was
( ) granted (X) denied ( ) withdrawn.

[X] Withholding of removal was
( ) granted (X) denied ( ) withdrawn.

[ ] A Waiver under Section _____ was
( ) granted ( ) denied ( ) withdrawn.

[ ] Cancellation of removal under section 240A(a) was
( ) granted ( ) denied ( ) withdrawn.

Respondent's application for:

[ ] Cancellation of removal under section 240A(b)(1) was
( ) granted ( ) denied ( ) withdrawn.
If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation of removal under section 240(b)(2) was
( ) granted ( ) denied ( ) withdrawn.
If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for adjustment of status under section _____ of the INA was
( ) granted ( ) denied ( ) withdrawn.
If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[X] Respondent's application for (X) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was
( ) granted (X) denied ( ) withdrawn or
( ) other.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until ____/____/____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

_____

Date: 10/23/08 /s/ Miriam Hayward
Miriam Hayward
Immigration Judge

Appeal: [WAIVED] / RESERVED ([A] / I / B)

Appeal Due By: 11/24/08

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL SERVICE (P) FAX (F)

TO: [ ] ALIEN [✓] ALIEN c/o Custodial Officer
[ ] ALIEN's ATT/REP [P] DHS

DATE: **10/23/08** BY: COURT STAFF **IJ: MH**

Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List

_____ Q6

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NILSON HERNEY VALENCIA-RIASCOS, Petitioner, v. ERIC H. HOLDER Jr., Attorney General, Respondent.	No. 09-70384 Agency No. A089-246-582 ORDER (Filed Sep. 9, 2010)

Before: CANBY, CALLAHAN and IKUTA, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. Judges Callahan and Ikuta have voted to deny the petition for rehearing en banc, and Judge Canby has recommended granting en banc rehearing.

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 10-771

In the Supreme Court of the United States

NILSON HERNEY VALENCIA-RIASCOS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1252(d)(1) requires issue exhaustion as a prerequisite to the court of appeals' exercise of jurisdiction over a petition for review of a decision of the Board of Immigration Appeals.

2. Whether application of 8 U.S.C. 1252(d)(1) in this case violated petitioner's right to due process under the Fifth Amendment.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 20

TABLE OF AUTHORITIES

Cases:

A-M-E- & J-G-U-, In re, 24 I. & N. Dec. 69 (B.I.A. 2007) 19

Acosta, In re, 19 I. & N. Dec. 69 (B.I A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987) 20

Alleyne v. *INS*, 879 F.2d 1177 (3d Cir. 1989) 12

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 15

Asencio v. *INS*, 37 F.3d 614 (11th Cir. 1994) 12

Barron v. *Ashcroft*, 358 F.3d 674 (9th Cir. 2004) 7, 15

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 12

Booth v. *Churner*, 532 U.S. 731 (2001) 9

Bowles v. *Russell*, 551 U.S. 205 (2007) 10

Cordon-Garcia v. *INS*, 204 F.3d 985 (9th Cir. 2000) 7

Eberhart v. *United States*, 546 U.S. 12 (2005) 17

Fernandez-Bernal v. *Attorney Gen.*, 257 F.3d 1304 (11th Cir. 2001) 15

Etchu-Njang v. *Gonzales*, 403 F.3d 577 (8th Cir. 2005) 12, 15

Cases—Continued: Page

Garcia-Carbajal v. *Holder*, 625 F.3d 1233 (10th Cir. 2010) 15
Greenlaw v. *United States*, 128 S. Ct. 2559 (2008) 17
Grullon v. *Mukasey*, 509 F.3d 107 (2d Cir. 2007) 16
Gutierrez-Berdin v. *Holder*, 618 F.3d 647 (7th Cir. 2010) 18
Henderson v. *Shinseki*, No. 09-1036, 2011 WL 691592 (Mar. 1, 2011) 14
Hormel v. *Helvering*, 312 U.S. 552 (1941) 10
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 2
INS v. *Elias-Zacarias*, 502 U.S. 478 (1992) 5, 19
Issaq v. *Holder*, 617 F.3d 962 (7th Cir. 2010) 16
Kucana v. *Holder*, 130 S. Ct. 827 (2010) 14, 15
Mambwe v. *Holder*, 572 F.3d 540 (8th Cir. 2009) 16
Margalli-Olvera v. *INS*, 43 F.3d 345 (8th Cir. 1994) 12
Massis v. *Mukasey*, 549 F.3d 631 (4th Cir. 2008), cert. denied, 130 S. Ct. 736 (2009) 15, 17
McKart v. *United States*, 395 U.S. 185 (1969) 8, 9
Mojsilovic v. *INS*, 156 F.3d 743 (7th Cir. 1998) 12, 15
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) 8
Omari v. *Holder*, 562 F.3d 314 (5th Cir. 2009) 15
Pena-Muriel v. *Gonzales*, 489 F.3d 438 (1st Cir. 2007), cert. denied, 129 S. Ct. 37 (2008) 18
Perkovic v. *INS*, 33 F.3d 615 (6th Cir. 1994) 12
Pierre v. *INS*, 932 F.2d 418 (5th Cir. 1991), overruled on other grounds by *Stone* v *INS*, 514 U.S. 386 (1995) 12

Cases—Continued: Page

Ramani v. *Ashcroft*, 378 F.3d 554 (6th Cir. 2004) 15
Ravindran v. *INS*, 976 F.2d 754 (1st Cir. 1992) 12
Sims v. *Apfel*, 530 U.S. 103 (2000) 10, 12, 13, 14
Sousa v. *INS*, 226 F.3d 28 (1st Cir. 2000) 15
Vargas v. *INS*, 831 F.2d 906 (9th Cir. 1987) 12
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 9
Xie v. *Ashcroft*, 359 F.3d 239 (3d Cir. 2004) 15
Zhong v. *United States Dep't of Justice*:
480 F.3d 104 (2d Cir. 2007) 16, 17
489 F.3d 126 (2d Cir. 2007) 12

Treaty, statutes, regulations and rule:

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85 2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 1
8 U.S.C. 1101(a)(42)(A) 3, 9
8 U.S.C. 1101(a)(47)(B) 12
8 U.S.C. 1105a(c) (1994) 2
8 U.S.C. 1158(a)(2)(B) 2
8 U.S.C. 1158(a)(2)(D) 2
8 U.S.C. 1158(b)(1) 2
8 U.S.C. 1158(b)(1)(A) 2
8 U.S.C. 1158(b)(2) 2
8 U.S.C. 1182(a)(6)(A)(i) 4
8 U.S.C. 1229a(a) 3

Statutes, regulations and rule—Continued: Page

8 U.S.C. 1229a(c)(1)(A) 3
8 U.S.C. 1229a(c)(5) 3, 9
8 U.S.C. 1231(b)(3)(A) 2
8 U.S.C. 1252(a)(1) 3
8 U.S.C. 1252(a)(2)(B)(ii) 14
8 U.S.C. 1252(a)(4) 3
8 U.S.C. 1252(a)(5) 3
8 U.S.C. 1252(b)(4)(B) 19
8 U.S.C. 1252(d)(1) ..... *passim*
8 C.F.R.:
Section 1003.1(b) 3
Section 1003.1(e)(4) 6
Section 1003.3(b) 3, 10, 13
Section 1208.13(a) 2
Section 1208.13(c)(1) 2
Section 1208.16(a) 2
Section 1208.16(c)(2) 3
Section 1208.18(a)(1) 3
Section 1240.8(d) 2
Section 1240.12(a) 3
Section 1240.15 3
20 C.F.R.:
Section 802.211(a) 13
Section 802.211(b) 13
Sup. Ct. R. 10 16

In the Supreme Court of the United States

No. 10-771

NILSON HERNEY VALENCIA-RIASCOS, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unreported. The opinions of the Board of Immigration Appeals (Pet. App. 3) and the immigration judge (Pet. App. 4-15) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2010. A petition for rehearing was denied on September 9, 2010 (Pet. App. 22). The petition for a writ of certiorari was filed on December 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in

their discretion, grant asylum to an alien who demonstrates that he is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). An alien applying for asylum generally must file his application within one year of arriving in the United States. 8 U.S.C. 1158(a)(2)(B) and (D). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1) and (2).

An alien also may be eligible for withholding of removal under the INA. See 8 U.S.C. 1231(b)(3)(A); 8 C.F.R. 1208.13(c)(1), 1208.16(a). Withholding of removal is available if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). In order to establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987).

An alien also may obtain deferral of removal under regulations implementing United States obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

(CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85. To obtain this protection, an applicant must demonstrate, *inter alia*, that it is more likely than not that he would be subject to severe pain or suffering intentionally inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" if removed to a certain country. 8 C.F.R. 1208.18(a)(1); see 8 C.F.R. 1208.16(c)(2).

b. Under the INA, administrative proceedings to determine whether an alien is entitled to remain in the United States typically begin before an immigration judge (IJ). 8 U.S.C. 1229a(a). After a hearing, the IJ issues a decision on the alien's removability and eligibility for relief from removal. 8 U.S.C. 1229a(c)(1)(A); 8 C.F.R. 1240.12(a). When the IJ enters an order of removal, he or she must "inform the alien of the right to appeal that decision." 8 U.S.C. 1229a(c)(5).

The Board of Immigration Appeals (Board) hears appeals from decisions of IJs. 8 C.F.R. 1003.1(b), 1240.15. A party that appeals to the Board "must identify the reasons for the appeal" and "must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged." 8 C.F.R. 1003.3(b). If the Board affirms an IJ's order of removal, that order becomes final. 8 U.S.C. 1101(a)(47)(B).

An alien may seek judicial review of a final order of removal by filing a petition for review in the appropriate federal court of appeals. See 8 U.S.C. 1252(a)(1), (4) and (5). Under 8 U.S.C. 1252(d)(1), however, the court "may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right."

2. Petitioner is a native and citizen of Colombia. Pet. App. 4. He entered the United States without authorization in June 2008. *Id.* at 4-5. He was charged with being removable as an alien present in the United States without having been admitted or paroled. *Ibid.*; Administrative Record (A.R.) 228-229; see 8 U.S.C. 1182(a)(6)(A)(i).

Petitioner sought asylum, withholding of removal, and CAT protection, contending that he would be persecuted and tortured on account of his political opinion if he was returned to Colombia. Pet. App. 5. Petitioner testified that his step-father was a fisherman and that petitioner worked as a sailor on his step-father's boat. *Ibid.* According to petitioner, one day guerillas from the Revolutionary Armed Forces of Colombia (FARC) boarded his step-father's boat and demanded that petitioner's step-father provide them with fish and fuel; petitioner's step-father refused, and several weeks later, he was found dead. *Id.* at 5-6. Petitioner stated that as a result of this incident, he feared harm from the FARC, and although he moved to different towns and cities in Colombia to avoid the FARC, he believed that the guerillas eventually would find him. *Id.* at 6-7. Petitioner also stated that he made a judicial complaint against the guerillas, but no action was taken by the police. *Id.* at 7. Petitioner acknowledged that he was never physically harmed or personally threatened by members of the FARC during his time in Colombia; that he and his step-father "had no involvement in political groups in Colombia"; and that petitioner "never joined any [of the] paramilitary group[s]" that opposed the FARC. *Id.* at 4-9, 13.

3. The IJ determined that petitioner is removable as charged and denied his requests for asylum, withholding

of removal, and CAT protection. Pet. App. 4-15. The IJ first held that petitioner failed to demonstrate a well-founded fear of persecution based on his political opinion. *Id.* at 10-11. The IJ explained that petitioner "never asserted any political opinion to the FARC and there is no reason why the FARC would attribute any particular political opinion to him," and that petitioner's step-father's murder was "because he refused to provide material aid or collaboration [to] the FARC" out of concern that it "would cause problems with the company for whom he worked," not "on account of his political opinion." *Ibid.* The IJ determined (*id.* at 11) that petitioner's claim was similar to the claim advanced in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), where the alien "asserted eligibility for [a]sylum based on threats received from guerilla groups when he refused to collaborate with them," and this Court held that the alien had not established persecution on account of his political opinion.

Although petitioner asserted that the only basis of his claim to asylum was political opinion, the IJ—because petitioner was proceeding pro se—considered whether petitioner was eligible for asylum or withholding of removal based on any other protected ground. Pet. App. 10-11. The IJ observed that "it could be argued that [petitioner] fears persecution on account of his membership in a particular social group" consisting of "relatives of his step-father or crew members on his step-father's boat," but the IJ determined that petitioner had not established a well-founded fear of persecution on either basis. *Id.* at 11-12. The IJ explained that "there is no indication that the other crew members on [petitioner's] step-father's boat suffered any reprisals from the FARC"; that petitioner's "other relatives, his

mother and sisters, continue to reside in Colombia" without incident; and that petitioner had not identified any male relatives who still lived in Colombia and faced threats from the FARC. *Id.* at 11. Accordingly, the IJ determined that petitioner has not "establish[ed] a nexus to a protected ground," and the IJ therefore denied his applications for asylum and withholding of removal. *Id.* at 12.

Finally, the IJ denied petitioner's request for CAT protection, explaining that petitioner had not shown that it was more likely than not that he would be tortured if he was returned to Colombia, or that such torture would be by or with the consent or acquiescence of the Colombian government. Pet. App. 12-14. The IJ then informed petitioner of his right to appeal the IJ's decision. A.R. 120-121.

4. Petitioner filed a notice of appeal with the Board, in which he stated that the IJ erred in holding that he failed to establish eligibility for asylum or withholding of removal based on a prospect of persecution because of his political opinion of opposition to the guerillas in Colombia. A.R. 24-26. Nowhere in his notice of appeal did petitioner claim eligibility for asylum or withholding of removal based on the distinct ground of his purported membership in a particular social group. Petitioner did not file a brief before the Board.[1]

The Board affirmed the decision of the IJ without issuing a separate opinion, making the IJ's decision the final agency determination. Pet. App. 3; see 8 C.F.R. 1003.1(e)(4).

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[1] Petitioner did not renew his CAT claim before the Board or make any separate argument in support of his CAT claim before the court of appeals. The CAT issue is not presented in his petition for a writ of certiorari, and accordingly it is not before this Court.

5. Petitioner filed a petition for review with the court of appeals. In his brief, petitioner argued that he had established eligibility for asylum and withholding of removal based on his membership in a particular social group consisting of the male relatives of his step-father. See Pet. C.A. Br. 13, 14-24. The government responded that the court of appeals lacked jurisdiction to consider this issue because petitioner had failed to present it to the Board, see Gov't C.A. Br. 8-13, and that in any event substantial evidence supported the IJ's conclusion that petitioner had not established a well-founded fear of persecution on account of a protected ground, see *id.* at 13-19. In his reply brief, petitioner argued that his failure to exhaust his particular social group claim "is not jurisdictional and the Court should excuse it" and that "any imposition * * * of a jurisdictional exhaustion requirement would deprive [him] of his Fifth Amendment Due Process right to fundamentally fair removal proceedings." Pet. C.A. Reply Br. 1; see *id.* at 2-27.

The court of appeals dismissed the petition for review in an unpublished, non-precedential opinion. Pet. App. 1-2. The court stated that "even construed liberally," petitioner's notice of appeal to the Board "provided the agency no notice that he was appealing the IJ's particular social group finding." *Id.* at 2. The court determined that petitioner's "failure to raise the particular social group issue before the [Board] constitutes a failure to exhaust administrative remedies" as required by 8 U.S.C. 1252(d)(1), and that failure to exhaust "depriv[es] [the court] of jurisdiction to entertain the claims raised in [petitioner's] petition for review." *Ibid.* (citing *Cordon-Garcia* v. *INS*, 204 F.3d 985, 988 (9th Cir. 2000), and *Barron* v. *Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004)).

6. Petitioner filed a petition for rehearing and rehearing en banc, which the court denied. Pet. App. 22.

ARGUMENT

Petitioner contends (Pet. 19-37) that the court of appeals erred in holding that his failure to present to the Board his claim of persecution based on his purported membership in a particular social group deprived the court of appeals of jurisdiction to decide that issue. Petitioner makes essentially three arguments: (1) that although 8 U.S.C. 1252(d)(1) requires exhaustion of remedies, it does not require an alien to present the particular issue on which he seeks judicial review to the Board; (2) that 8 U.S.C. 1252(d)(1) is not jurisdictional and therefore a court of appeals may excuse his failure to exhaust his administrative remedies; and (3) that if 8 U.S.C. 1252(d)(1) bars judicial review of his claim, it violates his Fifth Amendment right to due process. None of those arguments has merit. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly held that the statutory requirement that aliens exhaust issues before the Board before presenting them to the court of appeals is mandatory and jurisdictional. Exhaustion doctrines generally "provide[] 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *McKart* v. *United States*, 395 U.S. 185, 193 (1969) (quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). As this Court has explained, requiring administrative exhaustion serves a number of important purposes, including "preventing premature interference

with agency processes"; allowing the agency to "function efficiently" and "correct its own errors"; providing the "parties and the courts the benefit of [agency] experience and expertise"; assuring the development of a record "adequate for judicial review"; and affording the agency an opportunity to decide whether a claim is "invalid" on other grounds or whether relief may be granted "under a different section of the Act." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); accord *McKart*, 395 U.S. at 193-194. Where Congress has specified by statute that exhaustion is required, a court may not "dispense[ ]" with that requirement based on the court's own assessment that exhaustion would be "futil[e]." *Salfi*, 422 U.S. at 766; see, *e.g.*, *Booth* v. *Churner*, 532 U.S. 731, 741 n.6 (2001) (explaining that the Court "will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise").

As relevant here, Congress has specified in the INA that a "court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1). By its plain terms, Section 1252(d)(1) makes clear that judicial review is not permitted unless the alien has exhausted his administrative remedies through an appeal to the Board. The statutory framework, which requires an IJ to advise an alien of his "right to appeal" a removal order, 8 U.S.C. 1229a(c)(5), allocates initial appellate review to the Board and makes such an appeal "available as of right" within the meaning of the exhaustion mandate in Section 1252(d)(1). That conclusion is reinforced by 8 U.S.C. 1101(a)(47)(B), which specifies that an IJ's removal order becomes final only upon affirmance by the Board or upon expiration of the ap-

peal period if no appeal to the Board is taken, whichever is earlier.

The statutory mandate of exhaustion serves to vest exclusive initial appellate jurisdiction in the agency. See *Bowles* v. *Russell*, 551 U.S. 205, 212-213 (2007) ("Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."). As this Court recognized in *Bowles*, Congress has not authorized the federal courts to excuse non-compliance with statutory prerequisites to judicial review, and such judicially created exceptions "would no doubt detract from the clarity of the rule." *Id.* at 214.

Moreover, the relevant regulation confirms that exhaustion of administrative remedies means that the alien must have presented to the Board the particular issue he seeks to present to the court of appeals on petition for review. The regulation provides that in an appeal to the Board, the alien "must identify the reasons for the appeal" and "must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged." 8 C.F.R. 1003.3(b). This requirement of issue exhaustion is consistent with the administrative-law principle that "[o]rdinarily an appellate court does not give consideration to issues not raised below." *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941); accord *Sims* v. *Apfel*, 530 U.S. 103, 112 (2000) (O'Connor, J., concurring) ("In most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court.").

Accordingly, to obtain judicial review of the IJ's determination that petitioner failed to establish eligibility for asylum based on an asserted prospect of persecution because of his purported membership in a particular

social group, petitioner was required to present that claim to the Board on appeal. He did not. Petitioner's notice of appeal did not challenge the IJ's particular social group finding; instead, it raised an entirely different claim for relief, stating that petitioner was eligible for asylum because he would be persecuted based on his *political opinion* if he were returned to Colombia. See A.R. 23-27. Petitioner did not file any separate brief to the Board in which he argued that he was eligible for relief from removal based on his membership in a particular social group. Indeed, petitioner did not even raise his particular social group claim before the IJ; it was the IJ, not petitioner, who suggested—and rejected—such a claim. See Pet. App. 10-11. Because petitioner did not advance the claim that he would be persecuted because he is a member of a particular social group consisting of male members of his step-father's family at any stage before the agency, the court of appeals lacked jurisdiction to consider that claim under 8 U.S.C. 1252(d)(1). See Pet. App. 2.

2. Petitioner contends (Pet. 9-15) that although Section 1252(d)(1) requires exhaustion of administrative remedies, that does not mean he was required to present the particular issue on which he seeks judicial review to the Board. Petitioner's view is belied by the plain text of the statute and the regulations, which make clear that an alien must present to the Board any issue he seeks to present on petition for review in the courts of appeals. See pp. 8-10, *supra*. It is also inconsistent with the long-standing and uniform view of the courts of appeals that Section 1252(d)(1)'s exhaustion of remedies requirement means the alien must present each issue on which he seeks judicial review to the Board. Although there is some divergence in the courts of appeals regarding

whether the exhaustion requirement is jurisdictional or simply mandatory (see pp. 15-18, *infra*), petitioner has not identified any decision holding that Section 1252(d)(1) does not require issue exhaustion. To the contrary: Because the Board's "regulations * * * require issue exhaustion," the courts of appeals have "long held that issue exhaustion is mandatory." *Zhong* v. *United States Dep't of Justice*, 489 F.3d 126, 131 (2d Cir. 2007) (Calabresi, J., concurring in the denial of rehearing en banc); see, *e.g.*, *Etchu-Njang* v. *Gonzales*, 403 F.3d 577, 582-583 (8th Cir. 2005) (citing cases).[2]

Contrary to petitioner's contention (Pet. 12-13), this Court's decision in *Sims* v. *Apfel*, *supra*, does not support his view. In *Sims*, the Court held that a Social Security claimant who has been denied benefits by an administrative law judge must seek review of that denial

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[2] Prior to 1996, the INA included a substantially similar exhaustion provision, which provided that an order of deportation or exclusion "shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations." 8 U.S.C. 1105a(c) (1994). The courts of appeals likewise interpreted that provision as requiring exhaustion of the issues an alien seeks to raise on petition for review as a prerequisite for judicial review of those issues. See *Ravindran* v. *INS*, 976 F.2d 754, 761 (1st Cir. 1992); *Alleyne* v. *INS*, 879 F.2d 1177, 1182 (3d Cir. 1989); *Pierre* v. *INS*, 932 F.2d 418, 421 (5th Cir. 1991), overruled on other grounds by *Stone* v. *INS*, 514 U.S. 386 (1995); *Perkovic* v. *INS*, 33 F.3d 615, 619-620 (6th Cir. 1994); *Mojsilovic* v. *INS*, 156 F.3d 743, 748 (7th Cir. 1998); *Margalli-Olvera* v. *INS*, 43 F.3d 345, 350 (8th Cir. 1994); *Vargas* v. *INS*, 831 F.2d 906, 907-908 (9th Cir. 1987); *Asencio* v. *INS*, 37 F.3d 614, 615-616 (11th Cir. 1994). This "longstanding acceptance by the courts" that issue exhaustion is mandated by the INA, "coupled with Congress' failure to reject" that interpretation, provides additional support for the view that 8 U.S.C. 1252(d)(1) mandates issue exhaustion as a jurisdictional prerequisite to judicial review of agency action. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 733 (1975).

by the Social Security Appeals Council, but his failure to present a particular issue to the Appeals Council does not waive judicial review of that issue. *Id.* at 105, 108-110, 112. The Court explained that issue exhaustion may be required by statute or regulation. Specifically, the Court noted that although "requirements of administrative issue exhaustion are largely creatures of statute," "it is common for an agency's regulations to require issue exhaustion in administrative appeals," and "when regulations do so, courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues." *Id.* at 107-108. The Social Security regulations at issue in *Sims* "d[id] not require issue exhaustion" (*id.* at 108), and thus the Court concluded that the claimant's failure to raise an issue before the Appeals Council did not preclude judicial review of the issue. Here, by contrast, the applicable regulation clearly does require issue exhaustion, see 8 C.F.R. 1003.3(b), and thus issue exhaustion is required.[3] Indeed, the *Sims* Court explained that "the ra-

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[3] In *Sims*, the Court cited a Department of Labor regulation pertaining to petitions for review of employee benefits decisions before the Benefits Review Board as an example of an agency regulation that clearly requires issue exhaustion in administrative appeals. See 530 U.S. at 108. That regulation provides that "the petitioner shall submit a petition for review to the Board which petition lists the specific issues to be considered on appeal." 20 C.F.R. 802.211(a), see also 20 C.F.R. 802.211(b) ("[e]ach petition for review shall be accompanied by a supporting brief, memorandum of law or other statement which: Specifically states the issues to be considered by the Board."). The regulation pertaining to appeals to the Board of Immigration Appeals from immigration judge decisions closely mirrors that language. It provides that an alien appealing to the Board "must identify the reasons for the appeal" and "must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged." 8 C.F.R. 1003.3(b).

tionale for requiring issue exhaustion is at its greatest" in "an adversarial administrative proceeding," 530 U.S. at 110, like the one petitioner had before the Board. Thus, rather than support petitioner's view, *Sims* confirms the correctness of the court of appeals' decision.[4]

Petitioner is also mistaken in relying (Pet. 14-15) on this Court's decision in *Kucana* v. *Holder*, 130 S. Ct. 827 (2010), to support his argument that Section 1252(d)(1) does not require issue exhaustion. *Kucana* concerned the interpretation of a provision of the INA that precludes judicial review of certain discretionary determinations by the Attorney General or the Secretary of Homeland Security. That provision, 8 U.S.C. 1252(a)(2)(B)(ii), states that "no court shall have jurisdiction to review" any decision "the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." See *Kucana*, 130 S. Ct. at 831. The question in *Kucana* was whether a specification of discretion in a

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[4] This Court's recent decision in *Henderson* v *Shinseki*, No. 09-1036, 2011 WL 691592 (Mar. 1, 2011), likewise does not support petitioner's argument. In *Henderson*, the court concluded that the filing deadline for a notice of appeal in the Court of Appeals for Veterans Claims is not jurisdictional, because the provision setting forth that deadline "does not speak in jurisdictional terms" and "the review scheme that Congress created for the adjudication of veterans' benefits claims" reflects a particular solicitude for veterans and does not share key characteristics of adversarial administrative proceedings. *Id.* at *8-*9 (internal quotation marks omitted). Here, by contrast, Section 1252(d)(1) does speak in jurisdictional terms, stating that the courts of appeals "may review" a removal order only when the alien has exhausted his administrative remedies, 8 U.S.C. 1252(d)(1), and immigration proceedings are administrative adversarial proceedings, see *Henderson*, 2011 WL 691592, at *7 (contrasting the veterans' benefits scheme with judicial review of agency decisions under the INA)

regulation was a specification of discretion "under this subchapter"; the Court held it was not. *Ibid.* The *Kucana* Court did not address Section 1252(d)(1) or exhaustion of remedies generally, and it did not hold that issue exhaustion must be stated in a statute, as opposed to a regulation. It therefore provides no support for petitioner here.[5]

3. Petitioner next contends (Pet. 17-20) that certiorari is warranted to resolve disagreement in the courts of appeals regarding whether the exhaustion requirement in Section 1252(d)(1) is jurisdictional. He is mistaken. Although there is some variance in the courts of appeals on that issue, resolution of the issue would not affect petitioner's claim, because even the court of appeals that has deemed Section 1252(d)(1)'s exhaustion requirement non-jurisdictional has held that exhaustion is still mandatory.

Ten courts of appeals have held that issue exhaustion is mandatory and jurisdictional. See *Sousa* v. *INS*, 226 F.3d 28, 31-32 (1st Cir. 2000); *Xie* v. *Ashcroft*, 359 F.3d 239, 245 n.8 (3d Cir. 2004); *Massis* v. *Mukasey*, 549 F.3d 631, 638-640 (4th Cir. 2008), cert. denied, 130 S. Ct. 736 (2009); *Omari* v. *Holder*, 562 F.3d 314, 318-319 (5th Cir. 2009); *Ramani* v. *Ashcroft*, 378 F.3d 554, 559-560 (6th Cir. 2004); *Mojsilovic* v. *INS*, 156 F.3d 743, 748-749 (7th Cir. 1998); *Etchu-Njang*, 403 F.3d at 582-583; *Barron* v. *Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) (cited in Pet. 2); *Garcia-Carbajal* v. *Holder*, 625 F.3d 1233, 1236-1240 (10th Cir. 2010); *Fernandez-Bernal* v. *Attorney Gen.*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001); see also Pet. 17 (acknowledging that "most courts of appeals inter-

[5] *Arbaugh* v. *Y&H Corp*, 546 U.S. 500 (2006) (discussed at Pet. 26-28) likewise did not consider the exhaustion requirement in Section 1252(d)(1), and it therefore provides no support for petitioner here.

pret the immigration case issue exhaustion requirement as being jurisdictional").[6]

Petitioner contends (Pet. 16) that the Second Circuit held that Section 1252(d)(1) is not jurisdictional, citing *Zhong* v. *United States Dep't of Justice*, 480 F.3d 104 (2007). It is true that in *Zhong*, the Second Circuit held that issue exhaustion is mandatory in immigration cases, but is not jurisdictional, in the sense that although the court will not excuse an alien's failure to raise an issue to the Board if the government objects, the government may waive the requirement of issue exhaustion, allowing the court to "review * * * arguments not previously made to the [Board]." *Id.* at 120-124. But in a decision issued after *Zhong*, the Second Circuit held that Section 1252(d)(1) "is jurisdictional, not merely mandatory." *Grullon* v. *Mukasey*, 509 F.3d 107, 111-112 (2007). (In that case, an alien who was denied relief by the IJ filed a habeas corpus petition in federal court rather than appeal to the Board. *Id.* at 109-110.) These decisions are not necessarily irreconcilable; one could perhaps say

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[6] Petitioner suggests (Pet. 18) that there may be some intra-circuit disagreement on this issue in the Seventh and Eighth Circuits. It is true that the Seventh Circuit recently has suggested that an alien's failure to exhaust is not "a jurisdictional rule in the strict sense" but instead is "a case-processing rule that limits the arguments available to an alien in this court." *Issaq* v. *Holder*, 617 F.3d 962, 968 (2010). But that does not help petitioner, because an intra-circuit disagreement is not a basis for this Court's review, see Sup. Ct. R. 10, and even if Section 1252(b)(1) sets forth only a "claims-processing rule," it still would prevent petitioner from presenting his unexhausted claim to the Seventh Circuit. Similarly, although the Eighth Circuit has suggested that some exceptions might be allowed to Section 1252(b)(1), see *Mambwe* v. *Holder*, 572 F.3d 540, 550 (2009), any intra-circuit confusion does not justify this Court's review, and petitioner has not shown he fits within any exception suggested by the Eighth Circuit.

that the requirement of an appeal to the Board is jurisdictional and cannot be waived (*Grullon*), but that the requirement of issue exhaustion is not jurisdictional and may be waived (*Zhong*). See also *Massis*, 549 F.3d at 639 (noting uncertainty in Second Circuit law). But either way, it would not provide relief for petitioner, because even if the requirement of issue exhaustion could be waived, the government clearly has not waived it here.

Here, unlike in *Zhong*, the government objected in the court of appeals to petitioner's attempt to raise an issue he did not present to the Board. See Gov't C.A. Br. 8-13. Accordingly, the Second Circuit would recognize that Section 1252(d)(1) bars consideration of petitioner's claim. As the *Zhong* court made clear, its decision in that case "does not mean * * * that petitioners seeking review of their removal orders are ordinarily excused from issue exhaustion"; "[q]uite the contrary," "failure to exhaust specific issues before the [Board] is no more than an affirmative defense subject to waiver" by the government. 480 F.3d at 122, 124. Thus, even if the exhaustion requirement in Section 1252(d)(1) was not jurisdictional (in the absolute sense that it could not be waived by the government), it would still be mandatory, and thus would bar petitioner's claim. See *Greenlaw* v. *United States*, 128 S. Ct. 2559, 2564-2567 (2008) (declining to decide whether a statutory requirement that the government appeal or cross-appeal a criminal sentence is "jurisdictional," but recognizing no judicial discretion to make exceptions to that requirement); *Eberhart* v. *United States*, 546 U.S. 12, 18 (2005) (per curiam) (explaining that, even when a time limit in a procedural rule is not "jurisdictional," the court's duty to apply it is "mandatory" when the other party raises

an objection). Because petitioner could not prevail even under the Second Circuit's approach in *Zhong* (an approach that may have been modified by its later decision in *Grullon*), this case would not be an appropriate one to consider the minor disagreement in the circuits.

4. Petitioner contends (Pet. 35-37) that denying him judicial review of his unexhausted claim would violate due process. Significantly, petitioner has not identified any court that has accepted the view that application of the issue exhaustion requirement in Section 1252(d)(1) violates due process. And it does not. In the immigration context, due process generally requires that the alien be provided a meaningful opportunity to be heard. See *Gutierrez-Berdin* v. *Holder*, 618 F.3d 647, 654 (7th Cir. 2010) ("if an applicant in an immigration court has not received a meaningful opportunity to be heard, she has been denied due process") (internal quotation omitted); *Pena-Muriel* v. *Gonzales*, 489 F.3d 438, 444 (1st Cir. 2007) ("[D]ue process requires that the alien received notice of the charges against him, and a fair opportunity to be heard before an executive or administrative tribunal."), cert. denied, 129 S. Ct. 37 (2008).

Here, petitioner was afforded two levels of agency review—a hearing before the IJ and an appeal to the Board—thus providing him with ample opportunity to be heard on his claims. That petitioner chose to raise only a claim of persecution on account of political opinion—and not the entirely different claim of persecution based on membership in a particular social group—does not make his proceeding fundamentally unfair. Petitioner was heard on all claims he brought to the agency, and the IJ even considered some possible claims (such as a possible particular social group claim) that petitioner himself had not made. Had he presented the particular

social group claim to the Board, petitioner also could have obtained judicial review of that claim. Accordingly, there is no due process violation here.

5. This case would be a poor vehicle to consider the questions presented because even if the court of appeals could decide petitioner's claim, the claim would fail on the merits. If the court of appeals could review petitioner's claim, it would do so under the "substantial evidence" standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), and the agency's factual determinations would be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B).

On this record, petitioner could not show that the IJ's conclusion that he failed to establish a well-founded fear of persecution based on his membership in a particular social group was not supported by substantial evidence. Indeed, because petitioner never advanced any argument in support of this claim before the agency, he did not adduce evidence in support of the argument that there exists a group of male relatives of his step-father in Colombia, and that members of that group face persecution by the FARC due to their relationship to petitioner's step-father. See Pet. App. 12 (finding petitioner's "analysis of the situation * * * somewhat speculative" and stating that "it is unclear to what extent [petitioner's] step-father may have other male relatives still living in Colombia"). Before the court of appeals, petitioner argued that he would be persecuted by the FARC on account of his relationship to his step-father if returned to Colombia, Pet. C.A. Br. 14-17; but even taking that as true, it does not demonstrate that petitioner is a member of a social group that would be targeted by the FARC. See, *e.g.*, *In re A-M-E- & J-G-U-*,

24 I. & N. Dec. 69, 73-74 (B.I.A. 2007) (determination of what constitutes a "particular social group" is fact-intensive; *inter alia*, "members of a particular social group must share a common, immutable characteristic"; "the shared characteristic of the group should generally be recognizable by others in the community"; and the group must be "defined with the requisite particularity"); see also *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). Indeed, petitioner testified that his mother and sisters have been able to remain in Colombia. Pet. App. 11. Accordingly, there is no reasonable prospect that petitioner could prevail on his claim for asylum or withholding of removal. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

NILSON HERNEY VALENCIA-RIASCOS,

Petitioner,

vs.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
SUMMARY OF REPLY	1
ARGUMENT AND AUTHORITIES	3
PRAYER	13

TABLE OF AUTHORITIES

Page

CASES

Abbey v. Sullivan, 978 F.2d 37 (2d Cir. 1992) 10

Alcaraz v. I.N.S., 384 F.3d 1150 (9th Cir. 2004) 9

Arbaugh v. Y&H Corp., 546 U.S. 500 (2006) 5, 9

Bastek v. Federal Crop Insurance Corp., 145 F.3d 90 (2d Cir. 1998) 10, 11

Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003) 10

Booth v. Churner, 532 U.S. 731 (2001) 4

Bowles v. Russell, 551 U.S. 205 (2007) 6, 9

Castro v. United States, 540 U.S. 375 (2003) 11

Eberhart v. United States, 546 U.S. 12 (2005) (per curiam) 5

Etchu-Njang v. Gonzales, 403 F.3d 577 (8th Cir. 2005) 12

Farhoud v. I.N.S., 122 F.3d 794 (9th Cir. 1997) 9

Flores-Castillo v. Holder, 2011 WL 891799 (7th Cir., March 16, 2011) (not selected for publication) 9

Greenlaw v. United States, 554 U.S. 237 (2008) 11

Grullon v. Mukasey, 509 F.3d 107 (2d Cir. 2007), *certiorari denied*, 129 S.Ct. 43 (2008) 9

Henderson ex rel. Henderson v. Shinseki, 562 U.S. ___, 131 S.Ct. 1197 (March 1, 2011) ... 4, 5, 11, 12

Isaaq v. Holder, 617 F.3d 962 (7th Cir. 2010) 1, 9

TABLE OF AUTHORITIES – Continued

Page

John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008) 6

Kontrick v. Ryan, 540 U.S. 443 (2004) 6

Kucana v. Holder, 558 U.S. ___, 130 S.Ct. 827 (2010) 1, 8

Morrison v. National Australia Bank, Ltd., 130 S.Ct. 2869 (2010) 5

Reed Elsevier, Inc. v. Muchnick, 559 U.S. ___, 130 S.Ct. 1237 (2010) 5, 12

Scarborough v. Principi, 541 U.S. 401 (2004) 6

Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Division, 558 U.S. ___, 130 S.Ct. 584 (2009) 5, 6, 7, 8

Weinberger v. Salfi, 422 U.S. 749 (1975) 8

Zhong v. U.S. Department of Justice, 480 F.3d 104 (2d Cir. 2007) 1, 8, 9, 10

CONSTITUTIONAL PROVISION

U.S. CONST. amend. V 2

STATUTES

7 U.S.C. § 6912 11

8 U.S.C. § 1103 ..... 7, 8

8 U.S.C. § 1252 ..... *passim*

15 U.S.C. § 78j 5

TABLE OF AUTHORITIES – Continued

Page

17 U.S.C. § 411 5

28 U.S.C. § 2107 6

28 U.S.C. § 2412 6

28 U.S.C. § 2501 6

38 U.S.C. § 7266 5

42 U.S.C. § 1997e.....3

42 U.S.C. § 2000e.....5

45 U.S.C. § 152 6

45 U.S.C. § 153 .....7, 8

The National Railway Act, 45 U.S.C. §§ 451 et seq. 6

RULES AND REGULATIONS

8 C.F.R. § 1003.3.....1, 4, 8

29 C.F.R. § 301.2.....5, 6, 7

FED. R. BANK. PRO. R. 4004 6

FED. R. CRIM. PRO. R. 33.....6

SUMMARY OF REPLY

The Government's brief in opposition to certiorari should not sway this Court.

First, the Government argues unconvincingly that the plain meaning of 8 U.S.C. § 1252(d)(1) mandates issue exhaustion, even though 8 U.S.C. § 1252(d)(1) does not explicitly refer to issue exhaustion. The Government attempts also to locate a jurisdictional issue exhaustion requirement within 8 C.F.R. § 1003.3(b) (or within some interplay between 8 U.S.C. § 1252(d)(1) and of 8 C.F.R. § 1003.3(b)), even though the federal immigration regulations do not limit federal court jurisdiction. *Accord Kucana v. Holder*, 558 U.S. ___, 130 S.Ct. 827, 839-840 (2010).

Second, the Government implies there is no circuit split on whether 8 U.S.C. § 1252(d)(1) imparts a jurisdictional issue exhaustion requirement. *See* Resp. Opp., at p. 8.[1] Yet a split is readily apparent. The Petitioner's interpretation of 8 U.S.C. § 1252(d)(1) is consistent with the view of the Second Circuit and, increasingly, with the view of the Seventh Circuit. *See Zhong v. U.S. Department of Justice*, 480 F.3d 104 (2d Cir. 2007); *Isaaq v. Holder*, 617 F.3d 962 (7th Cir. 2010).

Third, the Government contends that certiorari should be denied because, assuming *arguendo* that

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[1] The Government appears to retreat from this position at page 17 of its Brief.

8 U.S.C. § 1252(d)(1) does not prescribe jurisdictional issue exhaustion, the Petitioner cannot advance his unexhausted particular social group argument in the face of the Government's timely objection. *See* Resp. Opp., at p. 17 (citing Gov't C.A. Brief, at pp. 8-13). This contention unduly hems the federal courts' authority to ascertain the character and applicability of any exceptions to a non-jurisdictional issue exhaustion rule.

Fourth, the Government asserts that "[t]his case would be a poor vehicle to consider the questions presented" because the Petitioner cannot prevail upon the merits. *See* Resp. Opp., at p. 19. Of course, the Petitioner disagrees that he cannot prevail. In any event, the strength of the Petitioner's substantive particular social group argument is not a matter about which this Court should concern itself – particularly since final resolution of the 8 U.S.C. § 1252(d)(1) jurisdictional controversy is a thing unrelated to the merits, and is of fundamental importance to the evolution of the national immigration law. *See* Pet. for Cert., at pp. 33-34 (citing numerous, recent dismissals for want of jurisdiction entered by the Ninth Circuit under 8 U.S.C. § 1252(d)(1)).[2]

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[2] The Petitioner respectfully submits that all other arguments raised by the Government, including the Government's attack upon the Petitioner's Fifth Amendment Due Process Claim, are satisfactorily addressed within the Petition for Certiorari.

ARGUMENT AND AUTHORITIES

1. The Government does not provide a compelling rationale for its view that 8 U.S.C. § 1252(d)(1) sets forth a jurisdictional issue exhaustion requirement. The Government insists that the plain meaning of 8 U.S.C. § 1252(d)(1) mandates jurisdictional issue exhaustion, but does not (it cannot) cite any statutory language which explicitly requires issue exhaustion.

Instead, the Government offers an overreaching analysis of 8 U.S.C. § 1252(d)(1).[3] The Government ambitiously alludes to a "statutory requirement that aliens exhaust issues before the Board," *see* Resp. Opp., at p. 8; and urges that "the plain text of the statute and the regulations . . . make clear that an alien must present to the Board any issue he seeks to present on petition for review to the court of appeals." *See id.*, at p. 11 (intra-textual reference omitted). Yet there is no immigration law – certainly, not 8 U.S.C. § 1252(d)(1) – which "make[s] clear" that immigrants must exhaust issues. *Cf. id.*[4] Moreover,

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[3] For the Government to succeed in its interpretation of 8 U.S.C. § 1252(d)(1), the Court must take two steps. First, the Court must hold that 8 U.S.C. § 1252(d)(1) impliedly commands issue exhaustion, *i.e.*, that the immigration issue exhaustion requirement is not judge-made. Second, the Court must hold that the implied requirement is jurisdictional.

[4] The Government evinces a misguided confidence about the plain meaning of the 8 U.S.C. § 1252(d)(1) remedy exhaustion requirement. *See* Resp. Opp., at pp. 8-12. For this Court has doubted that there is a "plain meaning" to a nearly identical remedy exhaustion requirement, contained within the Prison

(Continued on following page)

the immigration regulation cited by the Government, 8 C.F.R. § 1003.3(b),[5] does not (and cannot) alter the federal courts' subject matter jurisdiction.

1a. The absence of an explicit statutory issue exhaustion requirement – at 8 U.S.C. § 1252(d)(1), or anywhere else within the Immigration and Nationality Act, 8 U.S.C. §§ 1101 et seq. – is significant. In recent years, this Court repeatedly has refused to construe ambiguous statutory passages as erecting jurisdictional impediments to judicial review.[6] *See*

Litigation Reform Act, codified at 42 U.S.C. § 1997e(a). *See Booth v. Churner*, 532 U.S. 731, 737 (2001). The *Booth* Court expressed dissatisfaction with the parties' use of dictionary entries in order to define "available" "remedies." *See id.*, at 737-738; *id.*, at 737 ("Each of the parties also says that the plain meaning of the words 'remedies' and 'available' in the phrase 'such administrative remedies . . . available' is controlling. But as it turns out both of them quote some of the same dictionary definitions of 'available' 'remedies' and neither comes up with anything conclusive.").

[5] 8 C.F.R. § 1003.3(b) provides that, on appeal to the Board of Immigration Appeals, "The party taking the appeal must identify the reasons. . . ." The regulation also provides that, "The statement must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged."

[6] Concededly, a statutory rule need not include "magic words" in order to be jurisdictional. *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. ___, 131 S.Ct. 1197, 1203 (March 1, 2011). Many factors are apposite to a determination of a provision's jurisdictional character. Among them, "[C]ontext, including this Court's interpretation of similar provisions in many years past, is relevant." *Id.* (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. ___, 130 S.Ct. 1237, 1248 (2010)) (internal quotation marks omitted).

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Henderson ex rel. Henderson v. Shinseki, 562 U.S. ___, 131 S.Ct. 1197 (March 1, 2011) (the 38 U.S.C. § 7266(a) time period for filing a notice of appeal with the United States Court of Appeals for Veterans Claims is not jurisdictional); *Morrison v. National Australia Bank, Ltd.*, 130 S.Ct. 2869 (2010) (inquiry into the scope of the extraterritorial application of 15 U.S.C. § 78j(b) does not implicate subject matter jurisdiction); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. ___, 130 S.Ct. 1237 (2010) (the general requirement at 17 U.S.C. § 411(a) that, prior to filing a lawsuit for copyright infringement, an individual aggrieved have registered or have attempted to register his allegedly infringed copyright, is not jurisdictional); *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Division*, 558 U.S. ___, 130 S.Ct. 584 (2009) (the 29 C.F.R. § 301.2(b) requirement that, prior to submitting a labor dispute to arbitration before the National Railroad Adjustment Board, the parties have "conferenced" informally, is not jurisdictional); *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) (the 42 U.S.C. § 2000e(b) employee numerosity requirement, a precondition to a finding of employer liability for sexual harassment under Title VII of the Civil Rights Act of 1964, is not jurisdictional); *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam)

Herein, the Government has not cited any Supreme Court case which interprets 8 U.S.C. § 1252(d)(1).

(the FED. R. CRIM. PRO. R. 33 time limit for filing a motion for a new trial is not jurisdictional); *Scarborough v. Principi*, 541 U.S. 401 (2004) (the 28 U.S.C. § 2412(d) time limit for moving for law fees and costs under the Equal Access to Justice Act is not jurisdictional); *Kontrick v. Ryan*, 540 U.S. 443 (2004) (the FED. R. BANK. PRO. R. 4004 time limit for filing an objection to the discharge of a debtor is not jurisdictional); *but see John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008) (the 28 U.S.C. § 2501 court of claims statute of limitations is jurisdictional); *Bowles v. Russell*, 551 U.S. 205 (2007) (the 28 U.S.C. § 2107 time limit for filing an appeal of a final judgment in a civil action is jurisdictional).

1b. Of equal significance, this Court recently has refused to recognize a (purportedly) regulatory limitation upon agency jurisdiction. In *Union Pacific*, *supra*, the Court rejected the petitioner railroad's argument that the parties' (alleged) non-compliance with a regulation, 29 C.F.R. § 301.2(b), ousted the jurisdiction of the National Railroad Adjustment Board over five worker grievances. *Union Pacific*, 130 S.Ct., at 597-598. (The National Railway Act, 45 U.S.C. §§ 451 et seq., requires informal conferencing between railroad industry and labor union representatives, prior to the submission of a labor grievance to the NRAB. 45 U.S.C. § 152 Second. In turn, 29 C.F.R. § 301.2(b) provides that no worker grievance "petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the [National Railway Act]."

Union Pacific, 130 S.Ct., at 597 (quoting 29 C.F.R. § 301.2(b)).)

Noting that the NRAB only possesses the authority to "adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section," 45 U.S.C. § 153 First (v), the *Union Pacific* Court held: "[b]ut that provision [29 C.F.R. § 301.2(b)], as other prescriptions in Circular One [29 C.F.R., Part 301], is a claims processing rule." *Union Pacific*, 130 S.Ct., at 597-598. The Court concluded, "Congress gave the Board no authority to adopt rules of jurisdictional dimension." *Id.*, at 597.

Like 45 U.S.C. § 153 First (v), the congressional grant to the Attorney General of immigration-related rule-making authority, 8 U.S.C. § 1103(g)(2), appears to lack any conferral of the power to promulgate jurisdictional regulations. 8 U.S.C. § 1103(g)(2) is similar to 45 U.S.C. § 153 First (v). 8 U.S.C. § 1103(g)(2) provides:

> The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.

Id. Assertedly, if 45 U.S.C. § 153 First (v) is insufficiently explicit to effectuate a congressional delegation of authority to promulgate regulations which limit NRAB jurisdiction, *see Union Pacific*, 130 S.Ct., at 597, then 8 U.S.C. § 1103(g)(2) contains nothing which furnishes the Attorney General the authority to circumscribe federal judicial subject matter jurisdiction over immigration petitions for review. *But see Weinberger v. Salfi*, 422 U.S. 749, 766-767 (1975).

As such, the Government is mistaken to imply that 8 C.F.R. § 1003.3(b) imparts a jurisdictional issue exhaustion requirement. *Cf.* Resp. Opp., at p. 13. No immigration regulation limits the federal courts' subject matter jurisdiction. *Accord Kucana v. Holder*, 558 U.S. ___, 130 S.Ct. 827, 839-840 (2010).

1c. For all of the foregoing reasons, the Court should grant certiorari so as to confirm that 8 U.S.C. § 1252(d)(1) does not embody a jurisdictional issue exhaustion requirement.

2. The Government intimates that there is no circuit split about whether 8 U.S.C. § 1252(d)(1) directs jurisdictional issue exhaustion.[7] The Government is incorrect. There is a circuit split about whether 8 U.S.C. § 1252(d)(1) creates a jurisdictional issue exhaustion requirement.

The Government identifies no en banc opinion of the Second Circuit which overrules *Zhong v. U.S.*

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[7] *See* note 1, *supra*.

Department of Justice, 480 F.3d 104 (2d Cir. 2007). *See* Pet. for Cert., at p. 19 (discussing *Grullon v. Mukasey*, 509 F.3d 107 (2d Cir. 2007), *certiorari denied*, 129 S.Ct. 43 (2008)); *cf.* Resp. Opp., at p. 16 (stating that *Zhong* and *Grullon* "are not necessarily irreconcilable").

Furthermore, given this Court's instruction that lightly reasoned, "drive-by jurisdictional rulings" are not precedential, *see Arbaugh*, 546 U.S., at 511 (citation omitted), it now seems appropriate to place the Seventh Circuit firmly within the Second Circuit's camp. *See Isaaq v. Holder*, 617 F.3d 962, 968 (7th Cir. 2010). Presently, the Seventh Circuit treats 8 U.S.C. § 1252(d)(1) as being non-jurisdictional. *See id.*; *Flores-Castillo v. Holder*, 2011 WL 891799, at p. 3 (7th Cir., March 16, 2011) (not selected for publication).

Obviously, the Petitioner is not alone in his construction of 8 U.S.C. § 1252(d)(1).

3. The Government posits that, even if 8 U.S.C. § 1252(d)(1) does not command issue exhaustion, the distinction is semantic because the Government has preserved its objection to the Petitioner's unexhausted particular social group argument. *See* Resp. Opp., at pp. 15-18.

The Government overstates the legal significance of its objection. Prior to this Court's decision in *Russell*, the Ninth Circuit had alluded to the existence of "exceptions" (plural) to the immigration issue exhaustion requirement. *See Farhoud v. I.N.S.*, 122 F.3d 794, 796 (9th Cir. 1997) (emphasis added); *cf. Alcaraz v. I.N.S.*, 384 F.3d 1150, 1161 (9th Cir. 2004) ("We will

review an issue not raised in an appellant's opening brief if a failure to do so would result in manifest injustice. In addition, we may review an issue [not raised in briefs to this court] if the failure to raise the issue properly did not prejudice the defense of the opposing party.") (citations and internal quotation marks omitted). Presumably, only one of these several exceptions to a non-jurisdictional issue exhaustion doctrine would be susceptible to a Government objection.

What is more, contrary to the Government's pronouncement at page 17 of its Brief, the *Zhong* panel did not clearly hold that a mandatory issue exhaustion requirement is forgivable only if waived by the Government. Citing *Bastek v. Federal Crop Insurance Corp.*, 145 F.3d 90, 94 & n.4 (2d Cir. 1998), the *Zhong* Court stressed its "discretion" to "waive administrative exhaustion under certain circumstances." *Zhong*, 480 F.3d, at 123 (internal quotation marks omitted).

Bastek suggests that a judicial excuse of the exhaustion requirement is appropriate where – as here – persecution might befall a deported appellant:

> Such circumstances [warranting excuse] occur when . . . (5) "plaintiffs would suffer irreparable harm if required to exhaust their administrative remedies." *Abbey v. Sullivan*, 978 F.2d 37, 44 (2d Cir. 1992).

Bastek, 145 F.3d, at 94 n.4;[8] *see also Beharry v. Ashcroft*, 329 F.3d 51, 56 (2d Cir. 2003) ("The requirement

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[8] In a sign of how messy the jurisdictional quandary can be (thus warranting this Court's continued attention, as well as its

(Continued on following page)

of administrative exhaustion can be either statutorily or judicially imposed. . . . statutory exhaustion requirements are mandatory, while the judicial (common-law) exhaustion doctrine is discretionary and includes a number of exceptions.") (citations omitted); *cf. Greenlaw v. United States*, 554 U.S. 237, 243-244 (2008) ("To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights. See *Castro v. United States*, 540 U.S. 375, 381-383, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003).").

Thus, assuming that any immigration issue exhaustion requirement is judge-made, the requirement surely can be excused under a plethora of circumstances (for example, in cases of manifest injustice). If this Court holds that 8 U.S.C. § 1252(d)(1) does not embody a jurisdictional issue exhaustion requirement, the Court should confirm that the Ninth Circuit may excuse the failure to exhaust on remand. *See* Pet. for Cert., at pp. 34-35. At the very least, the Court should allow the Ninth Circuit to determine, in the first instance, the character and applicability of any and all (issue exhaustion) exceptions. *Accord Henderson*, 131 S.Ct., at 1306 ("We hold that the deadline for filing a notice of appeal with the Veterans

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intervention here), it is worth observing that the *Bastek* Court construed the exhaustion of remedies requirement at 7 U.S.C. § 6912(e) as statutorily mandating (non-waivable) issue exhaustion. *See Bastek v. Federal Crop Insurance Corp.*, 145 F.3d 90, 94-95 (2d Cir. 1998).

Court does not have jurisdictional attributes. The 120-day limit is nevertheless an important procedure rule. Whether this case falls within any exception to the rule is a question to be considered on remand.");[9] *Reed Elsevier*, 130 S.Ct., at 1249 (citations omitted).

4. Finally, the Government presses the inapposite contention that certiorari is unwarranted because the Petitioner cannot prevail upon the merits. *Cf.* Resp. Opp., at pp. 19-20. This is a misplaced distraction; the merits have nothing to do with 8 U.S.C. § 1252(d)(1). (Unlike the Eighth Circuit in *Etchu-Njang v. Gonzales*, 403 F.3d 577 (8th Cir. 2005), the Ninth Circuit did not make any alternative holding about the merits. *See* App. to Pet. for Cert., at pp. 1-2. Thus, the 8 U.S.C. § 1252(d)(1) jurisdictional controversy is squarely before this Court.)

All the same, the Petitioner can prevail on the merits, and he can overcome the Government's substantive attacks upon his particular social group argument. *Cf.* Pet. C.A. Brief, at pp. 13-24, *with* Resp. Opp., at pp. 19-20. His life may depend upon it. As the Immigration Judge stated:

> The Court regrets that the provisions of law which the Court must apply in this case do not offer adequate protection to the

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[9] The *Henderson* Court noted that the Government had not "disputed that the [Veterans Court notice of appeal filing] deadline is subject to equitable tolling if it is not jurisdictional." *Henderson*, 131 S.Ct., at 1306 n.4 (citation omitted).

> Respondent. The Court believes in fact that Respondent may undergo some danger if returned to Colombia.

Id., at p. 14; *cf. id.*, at p. 13 (" . . . the Court believes it reasonable to assume that if the guerrillas were to capture him [the Respondent] he would be dealt with the same as his step-father [who was murdered]").

PRAYER

Wherefore, premises considered, the Petitioner, Nilson Herney Valencia-Riascos, prays that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

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